No. 16-784	
Title:	**Merit Management Group, LP, Petitioner** **v.** **FTI Consulting, Inc.**
Docketed:	December 20, 2016
Linked with 16A492	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(15-3388)
Decision Date:	July 28, 2016
Rehearing Denied:	August 30, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Nov 14 2016	Application (16A492) to extend the time to file a petition for a writ of certiorari from November 28, 2016 to December 19, 2016, submitted to Justice Kagan.
Nov 17 2016	Application (16A492) granted by Justice Kagan extending the time to file until December 19, 2016.
Dec 16 2016	Petition for a writ of certiorari filed. (Response due January 19, 2017)
Jan 19 2017	Brief of respondent FTI Consulting, Inc. in opposition filed.
Feb 03 2017	Reply of petitioner Merit Management Group, LP filed.
Feb 08 2017	DISTRIBUTED for Conference of February 24, 2017.
Feb 22 2017	Rescheduled.
Feb 27 2017	DISTRIBUTED for Conference of March 3, 2017.
Feb 27 2017	Rescheduled.
Mar 13 2017	DISTRIBUTED for Conference of March 17, 2017.

Mar 13 2017	Rescheduled.
Mar 20 2017	DISTRIBUTED for Conference of March 24, 2017.
Mar 20 2017	Rescheduled.
Mar 27 2017	DISTRIBUTED for Conference of March 31, 2017.
Mar 28 2017	Rescheduled.
Apr 10 2017	DISTRIBUTED for Conference of April 13, 2017.
Apr 17 2017	DISTRIBUTED for Conference of April 21, 2017.
Apr 24 2017	DISTRIBUTED for Conference of April 28, 2017.
May 01 2017	Petition GRANTED.
Jun 05 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 13, 2017.
Jun 05 2017	The time to file respondent's brief on the merits is extended to and including September 11, 2017.
Jun 22 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner.
Jun 28 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Jul 13 2017	Joint appendix filed. (Statement of costs filed)
Jul 13 2017	Brief of petitioner Merit Management Group, LP filed.
Jul 18 2017	Brief amicus curiae of Opportunity Partners, L.P. filed.
Jul 20 2017	Brief amici curiae of Various Former Tribune and Lyondell Shareholders filed.
Aug 31 2017	SET FOR ARGUMENT on Monday, November 6, 2017

Sep 07 2017	CIRCULATED
Sep 11 2017	Brief of respondent FTI Consulting, Inc. filed. (Distributed)
Sep 18 2017	Brief amici curiae of Tribune Company Retirees and Noteholders filed. (Distributed)
Sep 18 2017	Brief amicus curiae of National Association of Bankruptcy Trustees filed. (Distributed)
Sep 18 2017	Brief amici curiae of Bankruptcy Law Professors Ralph Brubaker, et al. filed. (Distributed)
Oct 06 2017	Reply of petitioner Merit Management Group, LP filed. (Distributed)
Nov 06 2017	Argued. For petitioner: Brian C. Walsh, St. Louis, Mo. For respondent: Paul D. Clement, Washington, D. C.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Brian Christopher Walsh Counsel of Record	Bryan Cave LLP 211 N. Broadway, Suite 3600 St. Louis, MO 63102 brian.walsh@bryancave.com	314-259-2000
Party name: Merit Management Group, LP		
Attorneys for Respondent		
Paul D. Clement Counsel of Record	Kirkland & Ellis LLP 655 Fifteenth Street, NW Suite 700- 7th Floor Washington, DC 20005 paul.clement@kirkland.com	202-879-5000
Party name: FTI Consulting, Inc.		
Barbara Whiten Balliette	Reid Collins & Tsai LLP 1301 S. Capital of Texas Hwy. Building C, Suite 300 Austin, TX 78746 bballeiette@rctlegal.com	(512) 647-6100
Party name: FTI Consulting, Inc.		

Other

Jerrold Joseph Ganzfried Counsel of Record	Ganzfried Law 5335 Wisconsin Avenue, NW Suite 440 Washington, DC 20015 JJG@ganzfriedlaw.com	(202) 486-2004

Party name: Bankruptcy Law Professors Ralph Brubaker, et al.

Lawrence Saul Robbins Counsel of Record	Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP 1801 K Street, N.W. Washington, DC 20006 lrobbins@robbinsrussell.com	(202) 775-4500

Party name: Tribune Company Retirees and Noteholders

Bradford Jay Sandler Counsel of Record	Pachulski Stang Ziehl & Jones 10100 Santa Monica Blvd., Suite 1300 Los Angeles, CA 90067 bsandler@pszjlaw.com	310 277 6910

Party name: National Association of Bankruptcy Trustees

Philip D. Anker	Wilmer, Cutler, Pickering, Hale and Dorr, LLP 7 World Trade Center New York, NY 10007 philip.anker@wilmerhale.com	(212) 230-8890

Party name: Various Former Tribune and Lyondell Shareholders

Alan E. Golomb	492 Bardini Drive Melville, NY 11747 aandp492@aol.com	(516) 509-0509

Party name: Opportunity Partners, L.P.

RECORD
AND
BRIEFS

16-784
No. _____

Supreme Court, U.S.
FILED
DEC 16 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Section 546(e) of the Bankruptcy Code prohibits a trustee from avoiding a transfer that, among other things, is made "by or to (or for the benefit of)" a financial institution. The payment at issue in this case was made by one financial institution to another financial institution, but the benefit and detriment of this transfer ultimately impacted companies that are not financial institutions.

The question presented is thus:

Whether the safe harbor of 11 U.S.C. § 546(e) prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the Second, Third, Sixth, Eighth, and Tenth Circuits, but contrary to decisions from the Eleventh Circuit and now the Seventh Circuit.

PARTIES AND RULE 29.6 STATEMENT

Petitioner Merit Management, LP was the defendant in the district court and the appellee in the court of appeals. Petitioner has no corporate parent, and no publicly held company owns 10% or more of its partnership interests.

Respondent FTI Consulting, Inc., in its capacity as Trustee of the Centaur, LLC Litigation Trust, was the plaintiff in the district court and the appellant in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. Statutory Framework	4
B. Factual Background	6
C. Proceedings in District Court	7
D. The Court of Appeals' Decision	8
REASONS FOR GRANTING THE PETITION	9
I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE SCOPE OF THE SAFE HARBOR IN SECTION 546(e) OF THE BANKRUPTCY CODE	9
II. IF THE COURT GRANTS REVIEW IN THE *TRIBUNE* CASE, THIS PETITION SHOULD BE HELD	18
CONCLUSION	19

TABLE OF CONTENTS – Continued

Page

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Seventh Circuit (July 28, 2016) ..... App. 1

APPENDIX B: Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois (October 2, 2015) ..... App. 19

APPENDIX C: Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing En Banc (August 30, 2016) ..... App. 40

APPENDIX D: Statutes ..... App. 41

TABLE OF AUTHORITIES

Page

CASES

Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999).....15

Begier v. IRS, 496 U.S. 53 (1990).....4

In re Bernard L. Madoff Inv. Sec. LLC, 773 F.3d 411 (2d Cir. 2014).....13

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).....4

Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).....14

Contemporary Indus. Corp. v. Frost, 564 F.3d 981 (8th Cir. 2009).....11, 12

Czyzewski v. Jevic Holding Corp., No. 15-649.....14

DiPierre v. United States, 564 U.S. 70 (2011) 17

Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329 (2d Cir. 2011).....12

Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008).....15

Grede v. FCStone, LLC, 746 F.3d 244 (7th Cir. 2014).....18

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000).....15

In re Kaiser Steel Corp., 952 F.2d 1230 (10th Cir. 1991).....10

Lamie v. United States Trustee, 540 U.S. 526 (2004).....15

TABLE OF AUTHORITIES – Continued

Page

Law v. Siegel, 134 S. Ct. 1188 (2014) 18

Lewis v. City of Chicago, 560 U.S. 205 (2010) 17

In re Lyondell Chem. Co., 503 B.R. 348 (Bankr. S.D.N.Y. 2014).....13

In re MPF Holdings US LLC, 701 F.3d 449 (5th Cir. 2012) 5

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 10, 11, 12

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988).....18

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 16

Peterson v. Somers Dublin Ltd., 729 F.3d 741 (7th Cir. 2013).....17

In re Plassein Int'l Corp., 590 F.3d 252 (3d Cir. 2009).....11

Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016) 15

In re QSI Holdings, Inc., 571 F.3d 545 (6th Cir. 2009).....12

In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013) 12

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) 15, 17

In re Resorts Int'l, Inc., 181 F.3d 505 (3d Cir. 1999).....11, 12

TABLE OF AUTHORITIES – Continued

Page

In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317) 12, 13, 18, 19

United States v. Noland, 517 U.S. 535 (1996) 18

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 15

Whyte v. Barclays Bank PLC, 664 F. App'x 60 (2d Cir. 2016), *petition for cert. filed* (Aug. 24, 2016) (No. 16-239) 13

STATUTES

11 U.S.C. § 101 2

11 U.S.C. § 103(d) 5

11 U.S.C. § 544 2

11 U.S.C. § 544(a) 4

11 U.S.C. § 544(b) 4, 6

11 U.S.C. § 545 4

11 U.S.C. § 546(e) ..... *passim*

11 U.S.C. § 547 4

11 U.S.C. § 548 ..... 2, 4, 6

11 U.S.C. § 548(a)(1)(A) 5

11 U.S.C. § 548(a)(1)(B)(ii)(I) 8

11 U.S.C. § 741 2

11 U.S.C. § 764(c) (repealed 1982) 5

11 U.S.C. § 1107(a) 5

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 1123(b)(3)(B) 5

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1391(b)(2) 14

28 U.S.C. § 1409(a).....14

12 Pa. Cons. Stat. § 5105 18

OTHER AUTHORITIES

Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235 5

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 460(d), 98 Stat. 333 6

Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Merit Management, LP respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 830 F.3d 690. The memorandum opinion of the United States District Court for the Northern District of Illinois (Pet. App. 19-39) is reported at 541 B.R. 850.

JURISDICTION

The court of appeals entered judgment on July 28, 2016. That court denied rehearing en banc on August 30, 2016 (Pet. App. 40). By order entered November 17, 2016 (No. 16A492), the time for filing this petition was extended to December 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, 11 U.S.C. § 546(e) states:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the

> trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with a securities contract, as defined in section 741(7), . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Relevant portions of Sections 101, 544, 548, and 741 of the Bankruptcy Code are reproduced in the Appendix (Pet. App. 41-45).

STATEMENT

This case arises from the exchange of cash and stock certificates by which one company purchased the stock of another. Petitioner owned 30.07% of the stock in the acquired company, and it received approximately $16.5 million in two installments from the escrow agent that closed the transaction. Respondent is the successor in interest to the buyer, which commenced a Chapter 11 bankruptcy case in Delaware two years after the transaction closed.

Respondent commenced this litigation in Illinois, seeking to avoid and recover the payment of $16.5 million as a fraudulent transfer. The following fundamental issues are undisputed:

- The transfer involved here either was a settlement payment, or it was made in connection with a securities contract, as those terms are used in Section 546(e).
- The purchase price was disbursed by a financial institution that financed the transaction.
- The purchase price was paid to another financial institution that served as escrow agent.
- The escrow agent paid Petitioner its *pro rata* portion of the purchase price after Petitioner deposited its stock certificates into escrow.
- Neither the purchaser (Respondent's precedessor) nor Petitioner is itself a financial institution or one of the other types of entities discussed in Section 546(e).

The district court granted judgment on the pleadings to Petitioner, holding that Respondent's fraudulent-transfer claim was barred by the Section 546(e) safe harbor (Pet. App. 39). The Seventh Circuit reversed, concluding that the safe harbor does not apply when a financial institution "acts as a conduit" (Pet. App. 18). In its opinion, the court of appeals acknowledged that

five other circuits had reached contrary conclusions (Pet. App. 16).

A. Statutory Framework.

A bankruptcy trustee has several means of unwinding pre-bankruptcy transactions and collecting funds for redistribution to other creditors. They include the following:

- Avoiding certain transfers and obligations, such as unperfected liens, that would be voidable under non-bankruptcy law by judicial lien creditors or bona fide purchasers. *See* 11 U.S.C. § 544(a).
- Avoiding transfers and obligations that would be voidable by unsecured creditors under non-bankruptcy law, such as state fraudulent-transfer law. *See* 11 U.S.C. § 544(b).
- Avoiding certain statutory liens. *See* 11 U.S.C. § 545.
- Avoiding preferential transfers. *See* 11 U.S.C. § 547; *Begier v. IRS*, 496 U.S. 53, 56-57 (1990).
- Avoiding transfers and obligations under the Bankruptcy Code's own fraudulent-transfer provisions. *See* 11 U.S.C. § 548; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994).

In a Chapter 11 case, these powers normally may be exercised by the debtor in possession. *See* 11 U.S.C.

§ 1107(a). And it is common for these claims to pass from the debtor's bankruptcy estate to a liquidating trustee (such as Respondent) or a similar successor upon confirmation of a plan of reorganization or liquidation. *See* 11 U.S.C. § 1123(b)(3)(B); *In re MPF Holdings US LLC*, 701 F.3d 449, 453-54 (5th Cir. 2012).

But with one limited exception, these avoiding powers are subject to the statutory safe harbor of Section 546(e).[1] That statute protects from avoidance transfers "made by or to (or for the benefit of)" several types of entities, including financial institutions, arising from several types of transactions, including settlement payments and securities contracts. 11 U.S.C. § 546(e).

The original version of the safe harbor was added to the Bankruptcy Code in 1982.[2] It was limited to margin payments and settlement payments among commodity brokers, forward contract merchants, stockbrokers, and securities clearing agencies. *See* Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235,

---

[1] The safe harbor does not apply to claims "under section 548(a)(1)(A)." 11 U.S.C. § 546(e). That section addresses transfers made "with actual intent to hinder, delay, or defraud" creditors and is not at issue in this case. *Id.* § 548(a)(1)(A).

[2] The 1982 legislation also repealed a subsection of the Bankruptcy Reform Act of 1978 that was in some respects a precursor of today's Section 546(c). *See* 11 U.S.C. § 764(c) (repealed 1982). Because the 1978 language was located in Subchapter IV of Chapter 7, it governed only in cases in which the debtor was a commodity broker. *See* 11 U.S.C. § 103(d). Section 764(c) was thus much narrower in scope than the 1982 and subsequent versions of the safe harbor in Section 546(e).

236. Two years later, Congress added financial institutions to the safe harbor. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 460(d), 98 Stat. 333, 377.

A 2006 amendment further broadened the safe harbor to include securities contracts, commodity contracts, and forward contracts. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692, 2697-98. That same legislation modified the phrase "by or to a . . . financial institution" to its current form: "by or to (*or for the benefit of*) a . . . financial institution." *Id.* (emphasis added).

As discussed above, there is no dispute that this case involves financial institutions and either a settlement payment or a securities contract. Liability thus turns on whether the transfer at issue was made "by or to (or for the benefit of)" a financial institution.

B. Factual Background.

In the early 2000s, Valley View Downs, LP and Bedford Downs Management Corporation were in competition to obtain the last available harness-racing license in Pennsylvania. Valley View, which wanted to open a racetrack-casino, agreed in 2007 to purchase the stock of Bedford Downs, in which Petitioner had a 30.07% ownership interest, for $55 million.

The purchase price was funded by the Cayman Islands branch of Credit Suisse, which financed the acqusition for Valley View. As part of a larger transaction

totaling $850 million, Credit Suisse paid the $55 million purchase price for Bedford Downs to Citizens Bank of Pennsylvania, which served as the escrow agent under an escrow agreement dated September 4, 2007. Petitioner and other shareholders in Bedford Downs deposited their stock certificates into escrow with Citizens as well. After the transaction closed, Citizens disbursed Petitioner's portion of the proceeds in two installments, one in October 2007 and another more than three years later, in November 2010. Petitioner received approximately $16.5 million from Citizens.

Valley View obtained the harness-racing license it had sought, but it failed to procure a gaming license. The failure of Valley View's business strategy led it to file a bankruptcy petition in Delaware in October 2009. The bankruptcy court confirmed a plan of reorganization for Valley View and several affiliates that created a litigation trust. Valley View's causes of action against Petitioner and others were contributed to that trust. Respondent serves as trustee.

C. Proceedings in District Court.

Respondent commenced this suit in the Northern District of Illinois in 2011, seeking to avoid the transfer of $16.5 million to Petitioner, either under Pennsylvania fraudulent-transfer law, by way of Section 544(b) of the Bankruptcy Code, or under the Code's own fraudulent-transfer statute, Section 548. Respondent's theory was that Valley View did not receive reasonably equivalent

value for the Bedford Downs purchase price, and Valley View was insolvent at the time of the purchase. *See* 12 Pa. Cons. Stat. § 5105; 11 U.S.C. § 548(a)(1)(B)(ii)(I).

Petitioner moved to dismiss for lack of standing, or for a transfer of venue to Delaware, but the district court denied both motions.

Petitioner's motion for judgment on the pleadings, however, was successful. The district court noted that the essential facts were undisputed, including the presence of financial institutions and either a settlement payment or a securities contract in the underlying transaction (Pet. App. 20, 24). Relying on Seventh Circuit precedents that emphasized the broad text and plain meaning of Section 546(e), the district court concluded that Petitioner was entitled to the benefit of the safe harbor and granted judgment in Petitioner's favor (Pet. App. 39).

D. The Court of Appeals' Decision.

The Seventh Circuit reversed. It concluded that the phrase "by or to" in Section 546(e) is ambiguous and that the more recent addition "(or for the benefit of)" is ambiguous as well (Pet. App. 5-6). The court thus turned to what it perceived to be "the statute's purpose and context" (Pet. App. 6). Drawing on other provisions of the Bankruptcy Code that it believed were analogous, the court of appeals concluded that "it is the economic substance of the transaction that matters" (Pet. App. 12).

The Seventh Circuit also looked to the legislative history of the 1982 and 1984 iterations of the safe harbor, perceiving a fundamental goal of protecting the market from systemic risk (Pet. App. 13-15). Describing Valley View and Merit as "simply corporations that wanted to exchange money for privately held stock," the court dismissed the notion that its narrow view of Section 546(e) could produce "any potential ripple effect through the financial markets" (Pet. App. 15).

The court of appeals acknowledged that it was disagreeing with five other circuit courts (Pet. App. 16). But it concluded that "[i]f Congress had wanted to say that acting as a conduit for a transaction" involving entities that are not identified in the statute "is enough to qualify for the safe harbor, it would have been easy to do that" (Pet. App. 18).

The court of appeals denied Petitioner's request for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE SCOPE OF THE SAFE HARBOR IN SECTION 546(e) OF THE BANKRUPTCY CODE.

1. As the Seventh Circuit acknowledged, its decision deepened a longstanding circuit split on the breadth of the Section 546(e) safe harbor (Pet. App. 16-17).

This issue was first addressed by the Tenth Circuit in *In re Kaiser Steel Corp.*, 952 F.2d 1230 (10th Cir. 1991). The plaintiff in that case argued that a payment *by* a stockbroker, financial institution, or clearing agency is not protected by the safe harbor unless the payment also is *to* a similar entity. *See id.* at 1240. The court rejected that argument, seeing "no reason to replace the unambiguous language of the provision with clues garnered from the legislative history." *Id.* at 1240-41.

A divided panel of the Eleventh Circuit disagreed in *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996). As in this case, *Munford* involved a financial institution that collected and disbursed funds and stock certificates in connection with one company's purchase of another company's stock. *See id.* at 610. The majority concluded that because the financial institution "never acquired a beneficial interest in either the funds or the shares," the transaction was not within the safe harbor. *Id.* Judge Hatchett dissented, arguing that the majority "chose to disregard the plain language of section 546(e) in order to create a new exception to its application." *Id.* at 614 (Hatchett, C.J., dissenting).[3]

Until the Seventh Circuit decided this case, every other court of appeals to address this issue agreed with Judge Hatchett.

---

[3] Because the language "(or for the benefit of)" was not added to Section 546(e) until 2006, the Eleventh Circuit had no opportunity to consider the significance of that phrase.

The Third Circuit – home to the underlying transaction and Valley View's bankruptcy case – was the first to criticize *Munford* for applying a beneficial-interest requirement that "is not explicit in section 546." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999). That court also addressed one of the lines of reasoning used by the Seventh Circuit in this case – that a corporate acquisition is somewhat outside the core of securities transactions that motivated the enactment of the safe harbor in 1982 – and concluded that that argument did not justify a departure from the plain language of the statute. *See id.* The Third Circuit adhered to *Resorts International* ten years later, confirming that the safe harbor applies to transactions involving privately held companies. *See In re Plassein Int'l Corp.*, 590 F.3d 252, 258 (3d Cir. 2009).

The Eighth Circuit agreed with *Resorts International*, as well as with Judge Hatchett's dissent in *Munford*, in deciding that the safe harbor "does not expressly require that the financial institution obtain a beneficial interest in the funds" involved in a challenged transfer. *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009). That court also rejected the debtor-plaintiff's argument that a plain-language interpretation of the safe harbor would be absurd, recognizing that "Congress might have thought it prudent to extend protection to payments such as these." *Id.*

Next, the Sixth Circuit considered a case in which a bank served as exchange agent, collecting and distributing stock and cash in an acquisition transaction.

See In re QSI Holdings, Inc., 571 F.3d 545, 548 (6th Cir. 2009). Citing *Resorts International* and *Contemporary Industries*, the court rejected the beneficial-interest requirement of *Munford* and concluded that the bank's role "was sufficient to satisfy the requirement that the transfer was made to a financial institution." *Id.* at 551.

The Second Circuit has agreed with these courts in a series of decisions, including one that is now before this Court on a petition for a writ of certiorari. In the first of these cases, the Second Circuit held that a transfer may be a "settlement payment" even if it does not involve "a financial intermediary that takes title to the securities during the course of the transaction." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 339 (2d Cir. 2011). Two years later, the court clarified that its reasoning in *Enron* applied specifically to the "to or for (or for the benefit of)" language in Section 546(e). *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013). The Second Circuit held that the plain language of the statute demonstrates that "a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* at 100.

More recently, the Second Circuit followed *Quebecor* in a decision addressing the preemptive effect of Section 546(e) on fraudulent-transfer claims asserted by creditors. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 112, 122 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317). In its decision, the court anticipated and rejected one of the Seventh

Circuit's arguments in this case, pointing out that Section 546(e) is an example of "Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem." *Id.* at 120. The petitioners in *Tribune* have requested this Court to review both the preemption question, which is not presented in this case, and the beneficial-interest question, which is.[4]

2. The breadth of the Section 546(e) safe harbor is a recurring and important question. The courts have struggled with the application of the safe harbor in some of the largest Chapter 11 cases filed during recent economic downturns, including the cases of Enron Corporation, the Tribune Company, and others.[5] But the question is equally important in cases of more modest size, in which a claim to unwind an unsuccessful pre-bankruptcy transaction may be one of the most significant assets of a bankruptcy estate, at least if the claim can be asserted in a circuit with a narrow view of the safe harbor.

---

[4] A companion case presents only the preemption question. *See Whyte v. Barclays Bank PLC*, 664 F. App'x 60 (2d Cir. 2016), *petition for cert. filed* (Aug. 24, 2016) (No. 16-239).

[5] *See also In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411 (2d Cir. 2014) (addressing massive Ponzi scheme involving fictitious securities); *In re Lyondell Chem. Co.*, 503 B.R. 348 (Bankr. S.D.N.Y. 2014) (considering $12.5 billion leveraged buyout), *abrogated by Tribune*, 818 F.3d at 118, 122; Petition for Writ of Certiorari at 4, *Whyte v. Barclays Bank PLC*, No. 16-239 (Aug. 24, 2016) (describing transaction by debtor SemGroup as involving loss of $2.1 billion).

Consistency of interpretation is fundamentally important in matters of bankruptcy. Business bankruptcies in particular often involve debtors and creditors from throughout the United States. Inconsistent interpretations of the Bankruptcy Code in different circuits distort the incentives and expectations of debtors, trustees, creditors, and shareholders. In addition, uncertainty about the application of a safe harbor may alter investment decisions and may cause individuals and companies to refuse to deal with a distressed business because of concerns about potential liability.

This case demonstrates one difficulty arising from the circuit split. Respondent could have filed a single lawsuit against all of Bedford Downs' former shareholders in Pennsylvania, where the underlying transaction was centered, or in Delaware, where Valley View's bankruptcy case was filed. *See* 28 U.S.C. §§ 1391(b)(2), 1409(a). But this case would have been a dead letter if it had been commenced within the Third Circuit. Instead, Respondent brought suit against a subset of the former shareholders in jurisdictions where a claim was not obviously barred by controlling precedent. As a result, only those former shareholders that are subject to personal jurisdiction in particular parts of the country have potential exposure to Respondent's claims.

The importance of uniformity has led this Court to grant review in many cases involving circuit splits on bankruptcy issues. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, No. 15-649 (permissibility of "structured dismissal" of Chapter 11 case); *Bullard v. Blue Hills Bank*,

135 S. Ct. 1686, 1691 (2015) (appealability of order denying confirmation of plan); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 38 (2008) (breadth of tax exemption in Bankruptcy Code); *Lamie v. United States Trustee*, 540 U.S. 526, 533 (2004) (right to attorneys' fees after conversion to Chapter 7); *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 443 (1999) (absolute-priority rule for plan confirmation); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 238 (1989) (secured creditor's right to interest).

3. The Seventh Circuit's decision is wrong in at least three respects: it disregards the plain language of the safe harbor; it mistakes breadth for ambiguity; and it substitutes the court's understanding of Congress' principal goals for the language that Congress chose to implement its goals.

This Court has long emphasized the importance of interpreting the Bankruptcy Code in accordance with its plain meaning. *See, e.g.*, *Ron Pair*, 489 U.S. at 242; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). And the language of Section 546(e) could not be clearer: a transfer is protected if it is made by, to, *or* for the benefit of a financial institution. Whatever else may be said about Valley View's transfer of the funds that eventually made their way to Petitioner, there is no question that the transfer was made *to* Citizens Bank, a financial institution that

acted as escrow agent and held some of the funds for more than three years before disbursing them.

The Seventh Circuit perceived ambiguity in the statutory language "by or to (or for the benefit of)" (Pet. App. 5-6). But this conclusion was based on the court's understanding that a particular transfer might be characterized as made by or to (or for the benefit of) more than one person (*Id.*). That is possible, at least for some transfers, but it does not demonstrate that Congress was confused or imprecise when it drafted the safe harbor. Rather, it shows that Congress began with a broadly protective statute in the 1980s and then made it even more comprehensive in 2006.[6]

The Seventh Circuit's view that Congress was not primarily concerned about "corporations that wanted to exchange money for privately held stock" when it enacted the safe harbor is misguided (Pet. App. 15). This Court has recognized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998);

---

[6] Moreover, the Seventh Circuit's solution to the ambiguity it perceived was to interpret "by or to (or for the benefit of) . . . a financial institution" to mean "by or to (*and* for the benefit of) . . . a financial institution." If Congress had intended to narrow the safe harbor in 2006 – which is the implication of the Seventh Circuit's construction – it is extraordinarily unlikely that it would have done so by adding a disjunctive parenthetical to an already disjunctive phrase.

see also DiPierre v. United States, 564 U.S. 70, 85 (2011).[7]

Similarly problematic is the assertion by the court below that avoidance of the transfer would not produce a "ripple effect through the financial markets" (Pet. App. 15). The court may be correct that a judgment for Respondent in this case would not have systemic impact. But that also would be true if Citizens Bank or another financial institution had been the ultimate beneficiary of the transfer, and there is no question that the safe harbor would apply in that scenario.[8] In any event, a court may not "rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

Nor can the Seventh Circuit's interpretation be justified by its perception of the equities. This Court has held repeatedly that an outcome that appears inequitable in a particular case cannot justify an interpretation of the Bankruptcy Code that contravenes a policy decision of Congress. *See, e.g.*, *RadLAX*, 132

---

[7] The Seventh Circuit recognized as much in an earlier case involving Section 546(e). *See Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 749 (7th Cir. 2013) ("Statutes often are written more broadly than their genesis suggests.").

[8] It is possible to imagine situations similar to those in this case but involving larger amounts of money, or more complex financial arrangements, or unusual contractual commitments by "conduit" financial institutions. Avoidance of transfers in these situations might well produce ripple effects through the markets, but it is unclear whether the Seventh Circuit's interpretation of the safe harbor would protect the transferees.

S. Ct. at 2073 ("[T]he pros and cons of credit-bidding are for the consideration of Congress, not the courts."); *Law v. Siegel*, 134 S. Ct. 1188, 1197-98 (2014) (although interpretation "may produce inequitable results for trustees and creditors in other cases . . . , it is not for courts to alter the balance struck by the statute"); *United States v. Noland*, 517 U.S. 535, 543 (1996) ("[T]he circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Code."); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 209 (1988) ("[R]elief from current farm woes cannot come from a misconstruction of the applicable bankruptcy laws, but rather, only from action by Congress.").[9]

For these reasons, this Court should grant review to resolve the circuit split regarding the scope of the Section 546(e) safe harbor.

II. IF THE COURT GRANTS REVIEW IN THE *TRIBUNE* CASE, THIS PETITION SHOULD BE HELD.

The second Question Presented in the certiorari petition filed by the *Tribune* plaintiffs is essentially the same as the question presented here. If the Court

---

[9] The Seventh Circuit cited *Law* for this proposition in another recent case interpreting Section 546(e) broadly. *See Grede v. FCStone, LLC*, 746 F.3d 244, 254 (7th Cir. 2014) ("[C]ourts may not decline to follow [Congress'] policy choices on equitable grounds, however powerful they may be in a particular case.").

grants the *Tribune* petition, the disposition of that case may control in this one. But it also is possible that the resolution of other Questions Presented in *Tribune*, a settlement, or other developments may preclude the Court from deciding the conduit issue in that case. Thus, if the Court grants review in *Tribune*, it should hold this petition pending the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this petition should be held pending the disposition of the petition for certiorari in the *Tribune* case.

Respectfully submitted,

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

December 2016

830 F.3d 690
United States Court of Appeals,
Seventh Circuit.

FTI Consulting, Inc., Plaintiff-Appellant,

v.

Merit Management Group, LP, Defendant-Appellee.

No. 15-3388

Argued March 30, 2016

Decided July 28, 2016

Rehearing En Banc Denied Aug. 30, 2016.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 7670 – **Joan B. Gottschall**, *Judge*.

Attorneys and Law Firms

Gregory S. Schwegmann, Reid Collins & Tsai LLP, Austin, TX, for Plaintiff-Appellant.

Jason J. DeJonker, James B. Sowka, Seyfarth Shaw LLP, Chicago, IL, for Defendant-Appellee.

Before Wood, Chief Judge, and Posner and Rovner, Circuit Judges.

Opinion

Wood, Chief Judge.

This case requires us to examine section 546(e) of the Bankruptcy Code, which provides a safe harbor protecting certain transfers from being undone by the bankruptcy trustee. (We considered a different aspect of that statute in *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), which focused on what counts as a settlement payment made in connection with a securities contract, questions that do not arise in our case.) The safe harbor prohibits the trustee from avoiding transfers that are "margin payment[s]" or "settlement payment[s]" "made by or to (or for the benefit of)" certain entities including commodity brokers, securities clearing agencies, and "financial institutions." 11 U.S.C. § 546(e). It also protects transfers "made by or to (or for the benefit of)" the same types of entities "in connection with a securities contract." *Id.*

Ultimately, we find it necessary to answer only one question: whether the section 546(e) safe harbor protects transfers that are simply conducted *through* financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit. We hold that it does not, and accordingly we reverse the judgment of the district court.

I

This question has arisen in the bankruptcy proceeding of Valley View Downs, LP, owner of a Pennsylvania racetrack. In 2003, Valley View Downs was in competition with another racetrack, Bedford Downs, for the last harness-racing license in the state. Both racetracks wanted to operate "racinos" – combination horse track and casinos – and both needed the license to do so. Rather than fight over one license, Valley View and Bedford agreed to combine and conquer: Valley View would acquire all Bedford shares in exchange for $55 million. The exchange of the $55 million for the shares was to take place through Citizens Bank of Pennsylvania, the escrow agent. Valley View borrowed money from Credit Suisse and some other lenders to pay for the shares. After the transfer, Valley View obtained the harness-racing license, but it failed to secure the needed gambling license. This led it to file for Chapter 11 bankruptcy.

FTI Consulting, Inc., as Trustee of the *In re Centaur, LLC et al.* Litigation Trust, which includes Valley View Downs as one of the debtors, brought this suit against Merit Management Group ("Merit"), a 30% shareholder in Bedford Downs. FTI alleges that Bedford's transfer to Valley View and thence to Merit of approximately $16.5 million (30% of the $55 million), is avoidable under Bankruptcy Code sections 544, 548(a)(1)(b), and 550, and the money is properly part of Valley View's bankruptcy estate and thus the Litigation Trust.

There is no question that the transfer at issue is either a "settlement payment" or a payment made "in connection with a securities contract." Merit maintained that the transfer was "made by or to (or for the benefit of)" an entity named in section 546(e) and therefore protected under the safe harbor. It did not rely on its own status for this argument, because it is undisputed that neither Valley View nor Merit is a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency (the entities named in section 546(e)). Instead, Merit argued eligibility for the safe harbor based on the minor involvement of Citizens Bank and Credit Suisse. The district court agreed with Merit, finding that the transfers were "made by or to" a financial institution because the funds passed *through* Citizens Bank and Credit Suisse. It granted judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) in Merit's favor, thereby preventing FTI from avoiding the transfer and recovering the $16.5 million. FTI appeals.

II

We review the district court's Rule 12(c) judgment on the pleadings *de novo*. *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). There are no contested facts.

A

In order to resolve this case, we must ascertain the meaning of section 546(e). We begin at the obvious place, with its text:

> [T]he trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . made *by or to* (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made *by or to* (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract. . . .

(Emphasis added.) It is impossible to say in the abstract what the italicized words, "by or to," mean here. As FTI points out, a postcard sent through the U.S. Postal Service could be said to have been sent "by" the Postal Service or "by" the sender who filled it out. When a person pays her bills using an electronic bank transfer, the funds could be said to be sent "by" the owner of the account or by the bank. Similarly, a transfer through a financial institution as intermediary could reasonably be interpreted as being "made by or to" the financial institution or "made by or to" the entity ultimately receiving the money. The plain language does not clarify whether, under the statute, the transfer of the $16.5 million was made by Valley View to Merit; by Valley View to Citizens Bank; by Citizens

Bank to Credit Suisse; or by Citizens Bank or Credit Suisse to Merit. These multiple plausible interpretations require us to search beyond the statute's plain language. (We reject Merit's argument that FTI has waived the right to argue that the statute is ambiguous; it urged the district court to consider the purpose and context of the statute, which implicitly indicates that the meaning is not immediately clear.)

The phrase "for the benefit of," which was added to the safe harbor in a 2006 amendment, is also ambiguous. It could refer to a transaction made *on behalf of* another entity, or it could mean a transaction made merely *involving* an entity receiving an actual financial or beneficial interest. The latter reading suggests that transactions between parties other than the named entities receiving a financial interest (but related to those entities) are also included in the safe harbor – otherwise the additional parenthetical would be redundant. If the former interpretation is used, FTI's argument that the whole phrase refers only to named entities receiving a financial interest – whether or not that entity received the actual transfer of property – is plausible.

The language of the statute, standing alone, does not point us in one direction or the other. In particular, it is unclear whether the safe harbor was meant to include intermediaries, or if it is limited to what we might think of as the real parties in interest – here, the first and the final party possessing the thing transferred. We therefore turn to the statute's purpose and context for further guidance. *See Food & Drug Admin.*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (courts must interpret a "statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citations omitted); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

B

1

Section 546(e) appears in Subchapter III of Chapter 5 of the Bankruptcy Code, which deals with what property is included within the estate. While section 546 covers limitations on a trustee's avoidance powers, other sections – in particular sections 544, 547, and 548 – set out types of transfers that a bankruptcy trustee can avoid. Section 550 describes how to recover the funds from transfers that are avoidable. The trustee's avoidance powers serve the broad purpose of ensuring the equitable distribution of a debtor's assets.

Section 544 gives the trustee the power to avoid transfers that would be voidable by a creditor extending credit to the debtor at the commencement of the case, if that creditor had a judicial lien or an unsatisfied execution against the debtor, or by a bona fide purchaser. 11 U.S.C. § 544(a). It allows the trustee to act

as such a creditor or bona fide purchaser. *Id.* Section 547 allows the trustee to avoid any transfer of any interest of the debtor "to or for the benefit of a creditor," made within 90 days before the filing (or longer if the creditor was an insider) and the transfer was more than the creditor would otherwise have received. *Id.* § 547(b). Section 548(a) allows avoidance of transfers done with fraudulent intent and transfers that rendered a debtor insolvent.

FTI argues that because these other Chapter 5 sections establish that only transfers "made by the debtor" prior to the bankruptcy petition are avoidable, transfers "made by" a named entity in section 546(e) ought also to refer to a transfer of property by the debtor. Additionally, FTI argues that because sections 544, 547, and 548 refer to avoidance of transfers to or for the benefit of entities subject to fraudulent-transfer liability, section 546(e)'s safe harbor must refer only to transfers made to a named entity that is a creditor.

We agree with FTI. Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance – logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place.

Merit responds that sections 544, 547, and 548 implicate obligations "incurred by" a debtor, as opposed to transfers "made by" a debtor, and therefore Chapter 5 read as a whole does not support the argument that

only transfers made by a debtor that constitute obligations incurred by a debtor are within 546(e)'s safe harbor. We see it differently. If anything, the "incurred by" language in the other sections supports FTI's position. Because the safe harbor is meant to protect covered entities against avoidance where it might occur, the fact that sections 544, 547, and 548 permit avoidance only where the transfer represents an actual obligation means that 546(e) provides a safe harbor only where the debtor has incurred an actual obligation to the covered entity.

Merit also argues that Chapter 5 allows avoidance of transfers other than those made directly by the debtor, because "indirect transfers made by third parties to a creditor on behalf of the debtor may also be avoidable." *Warsco v. Preferred Technical Grp.*, 258 F.3d 557, 564 (7th Cir. 2001). Therefore, Merit concludes, FTI's "attempt to simplify section 548(a)(1) to avoidance only of 'transfers made by a debtor' is simply not supported." But *Warsco* is irrelevant to FTI's position, as it does not speak to avoiding transfers involving financial intermediaries. The $16.5 million transfer to Merit was not a transfer made on behalf of a debtor by a third party; rather, it was one made by the debtor using a bank as a conduit.

2

Section 548(a)(1) allows a trustee to avoid transfers "of an interest of the debtor in property, or any obligation . . . incurred by the debtor" within two years of

bankruptcy if the debtor made the transfer with either (A) the "actual intent to hinder . . . or defraud" an entity to which the debtor was indebted, or where (B) the debtor received less money for the transfer than its value, or was insolvent on the date of transfer or became insolvent because of the transfer, or made the transfer to benefit an insider. 11 U.S.C. § 548.

Section 548(c) exempts from avoidance a transferee or obligee that "takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation." *Id.* § 548(c). Section 548(d)(2) adds that a commodity broker or financial institution or other protected entity that receives a margin or settlement payment "takes for value to the extent of such payment" within the meaning of subsection (c).

FTI points out that section 548(d)(2)'s protections apply only where the defendant in a fraudulent-transfer action is one of the types of entities listed in section 546(e). It reasons that Congress cannot have intended to give an entity not listed under section 548(d)(2)(B) a defense simply because it deposited its funds in a bank account. It is the receipt of the value that gives a fraudulent-transfer defendant the protections of section 548(d)(2)(B), and it should similarly be the receipt of value that gives an entity the safe-harbor protections of 546(e).

Merit responds that 548(c) creates a transferee-specific affirmative defense, unlike section 564(e), which addresses the transfer and not the transferee. But we see no reason to differentiate between the two. Merit's preferred interpretation would be so broad as to render any transfer non-avoidable unless it were done in cold hard cash, and that conflicts with section 548(c)'s good faith exception.

3

FTI also finds support in the charitable-contribution safe harbor found in section 548(a)(2), as well as in section 555's safe harbor from enforcement of the Bankruptcy Code's automatic stay. Section 548(a)(2) shields charitable contributions made "by a natural person" "to a qualified" charity from avoidance by a trustee. FTI contends that the "by" and "to" language in section 548(a)(2) should be read consistently with section 546(e), because doing otherwise would lead to an absurd result: charitable contributions made via wire transfer, or perhaps even with an old-fashioned paper check, through a bank would be avoidable.

Section 555 allows the same entities as those named in section 546(e), where they are counterparties to a securities contract with the debtor, to enforce an *ipso facto* clause in a securities contract despite the Code's general prohibition on non-debtor counterparties enforcing those clauses. *See id.* §§ 555, 365(e), 362(a). FTI argues that we should read these sections

consistently. Because section 555 focuses on the economic substance of the transaction, applying only where the named entity is a counterparty as opposed to a conduit or bank for a counterparty, section 546(e)'s safe harbor should apply in the same manner. We agree with FTI that it is the economic substance of the transaction that matters.

4

Section 550 describes how the trustee is to recover avoidable transfers. The trustee can recover the property or its value from the "initial transferee" or "any immediate or mediate transferee." *Id.* § 550. It protects good faith transferees who did not know of the voidability of the transfer, and "any immediate or mediate good faith transferee of such transferee." *Id.*

Although Section 550 allows recovery from a "mediate" transferee, the question *how* money may be recovered is different from the question *from whom* money may be recovered. Although mediate transferees may be required to return funds to which they are not entitled under the Bankruptcy Code's avoidability provisions, mediate transferees are not eligible for the safe harbor because they lack a financial stake comparable to that of a debtor or a party to whom a debt is owed. Section 550 also contains a good-faith exception to protect unknowing mediate transferees, and so such transferees should not need the safe harbor.

In *Bonded Financial Services, Inc. v. European American Bank*, we defined "transferee" as an entity

with "dominion over the money" or "the right to put the money to one's own purposes." 838 F.2d 890, 893 (7th Cir. 1988). We found that a bank that "acted as a financial intermediary" and "received no benefit" was not a "transferee" within the meaning of Chapter 5 of the Bankruptcy Code. *Id.* Although we did not address the 546(e) safe harbor specifically, we now extend our reasoning in *Bonded* to find that transfers "made by or to (or for the benefit of)" in the context of 546(e) refer to transfers made to "transferees" as defined there. We reject Merit's argument that *Bonded* does not apply because, rather than providing a defense, section 546(e) renders a transfer unavoidable. We see no reason why the unavoidability provisions should be broader than defenses to recovery; if anything, the opposite should be true.

C

The history of section 546(e) also supports the position we take here, and illustrates why our holding will not give rise to problems in the financial-services markets. Congress first enacted the safe harbor in response to a New York federal district court decision: *Seligson v. New York Produce Exchange*, 394 F.Supp. 125 (S.D.N.Y. 1975). In *Seligson*, the trustee of a commodity broker's bankruptcy estate sued the New York Produce Exchange and the New York Produce Exchange Clearing Association to recover payments the broker made to the Association in connection with cottonseed oil futures, which declined in value drastically. 394 F. Supp. at 126-27. The court denied summary

judgment, finding a triable issue of fact on the questions whether the Association was a "transferee" within the meaning of the Bankruptcy Code's avoidability provisions, and whether the Exchange could be held liable because of its relationship with the Association. *Id.* at 134, 136-37.

Congress responded in 1982 by creating the safe harbor, which enabled financial institutions that were recipients of transfers of the kind that took place in *Seligson* to invoke a safe harbor from avoidance. Pub. L. No. 97-222, § 4, 96 Stat. 235 (1982). Congress later expanded the safe harbor to other types of actors in the securities industry, including financial institutions. *See* Pub. L. No. 98-353, § 441, 98 Stat. 333 (1984). Nothing it did, however, indicated that the safe harbor applied to those institutions in their capacity as intermediaries. The safe harbor has ample work to do when an entity involved in the commodities trade is a debtor or actual recipient of a transfer, rather than simply a conduit for funds.

Our interpretation is consistent with this understanding of the law. As we explained in *Grede v. FCStone, LLC*, the safe harbor's purpose is to "protect[] the market from systemic risk and allow[] parties in the securities industry to enter into transactions with greater confidence" – to prevent "one large bankruptcy from rippling through the securities industry." 746 F.3d 244, 252 (7th Cir. 2014). Congress's discussion of the 2005 amendments to the Code, passed as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, reemphasized the safe

harbor's purpose as reducing "systemic risk in the financial marketplace." H.R. Rep. 109-31(I), at 3, *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Although we have said that section 546(e) is to be understood broadly, *see Grede*, 746 F.3d at 246 ("[t]he code has a broad exception from avoidance or clawback . . . for payments made to settle securities transactions"), that does not mean that there are no limits. While Valley View's settlement with Bedford resembled a leveraged buyout, and in that way touched on the securities market, neither Valley View nor Merit were "parties in the securities industry." They are simply corporations that wanted to exchange money for privately held stock.

We are not troubled by any potential ripple effect through the financial markets from returning the funds to FTI. The safe harbor addresses cases in which the debtor-transferor or transferee is a financial institution or other named entity. *See* H.R. Rep. 97-420, at 1, *reprinted in* 1982 U.S.C.C.A.N. 583 (discussing the extension of the 546(e) safe harbor to the securities market to avoid "the insolvency of one commodity or security firm spreading to other firms and possibl[y] threatening the collapse of the affected market"). Valley View's bankruptcy will not trigger bankruptcies of any commodity or securities firms. Even if Valley View's bankruptcy were to "spread" to Merit after avoidance of the transfer, there is no evidence that it would have any impact on Credit Suisse, Citizens Bank, or any other bank or entity named in section 546(e). Nor are we persuaded that the repercussions of

undoing a deal like this one outweigh the necessity of the Bankruptcy Code's protections for creditors. We will not interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds.

D

We recognize that we are taking a different position from the one adopted by five of our sister circuits, which have interpreted section 546(e) to include the conduit situation. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94 (2d Cir. 2013) (finding safe harbor applicable where financial institution was trustee and actual exchange was between two private entities); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009) (finding § 546(e) not limited to public securities transactions, and exempting from avoidance Chapter 11 debtor's payments that were deposited in a national bank in exchange for shareholders' privately-held stock during leveraged buyout, as settlement payments made to financial institution); *In re QSI Holdings, Inc.*, 571 F.3d 545, 551 (6th Cir. 2009) (finding HSBC's role in a leveraged buyout "sufficient to satisfy the requirement that the transfer was made to a financial institution" although it was only the exchange agent); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999) (noting that "the requirement that the 'commodity brokers, forward contract merchants, stockbrokers, financial institutions, and securities clearing agencies' obtain a 'beneficial interest' in the funds they

handle . . . is not explicit in section 546"); *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991) (rejecting Kaiser's argument that "even if the payments were settlement payments, § 546(e) does not protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder").

One circuit, however – the Eleventh – agrees with us. In *Matter of Munford, Inc.*, the Eleventh Circuit found section 546(e) inapplicable to payments made by Munford to shareholders because financial institutions were involved only as conduits. 98 F.3d 604, 610 (11th Cir. 1996). Merit contends that Congress disapproved *Munford* by passing the 2006 Amendment adding "(or for the benefit of)," *see* H.R. Rep. 109-648, at 23, *reprinted in* 2006 U.S.C.C.A.N. 1585, 1593, and that Congress was responding to the Eleventh Circuit's language in *Munford* that "[t]he bank never acquired a beneficial interest in either the funds or the shares." 98 F.3d at 610. Merit would interpret the amendment as listing acquiring a beneficial interest as only one way of several to satisfy the requirements (the other way being making or receiving a transfer). The Second Circuit has agreed with this position. *See Quebecor*, 719 F.3d at 100 n. 3.

We do not believe that Congress would have jettisoned *Munford*'s rule by such a subtle and circuitous route. Its addition of an alternate way to meet the safe harbor criteria says nothing about the method already

in the statute. If Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not.

III

Because we find that section 546(e) does not provide a safe harbor against avoidance of transfers between non-named entities where a named entity acts as a conduit, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

541 B.R. 850
United States District Court,
N.D. Illinois, Eastern Division.

FTI Consulting, Inc., Trustee of the
Centaur, LLC Litigation Trust, Plaintiff,
v.
Merit Management Group, LP., Defendant.

Case No. 11 C 7670
|
Signed October 2, 2015

Attorneys and Law Firms

Gregory Scott Schwegmann, Joshua J. Bruckerhoff, Paul T. Harle, Reid Collins & Tsai LLP, Austin, TX, Marcus D. Fruchter, Jason M. Rosenthal, Honigman Miller Schwartz and Cohn LLP, Chicago, IL, for Plaintiff.

Jason Jon DeJonker, Christopher James Harney, Jeffrey Phillip Swatzell, Michael Ryan Pinkston, Seyfarth Shaw LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

Joan B. Gottschall, United States District Judge

FTI Consulting, Inc., as Trustee of the Centaur, LLC Litigation Trust, sued Merit Management Group, LP, in an attempt to avoid an allegedly fraudulent transfer of $16,503,850 to Merit. Merit's motion for judgment on the pleadings pursuant to Fed. R. Civ. P.

12(c) is before the court. For the following reasons, the motion is granted.

I. BACKGROUND

The essential facts in this case are undisputed. This case arises out of efforts by an entity named Valley View Downs to develop a "racino" (a race track with a casino, which requires both racing and gaming licenses) in Pennsylvania. In 2002, Valley View and Bedford Downs Management Corporation both applied for Pennsylvania's last available harness-racing license. The Pennsylvania State Harness Racing Commission initially denied their applications, but after litigation in Pennsylvania state court, the Commission allowed Valley View and Bedford Downs to reapply.

To strengthen its chances at securing the racing license, Valley View decided to buy out the competition. Thus, Valley View, Bedford Downs, and others entered into a settlement agreement dated August 14, 2007 (the "Settlement Agreement"). (Dkt. 60-2 through 60-7.) The Settlement Agreement required Valley View to pay Bedford Downs $55 million in exchange for all of Bedford Downs's stock. On September 4, the parties to the Settlement Agreement entered into an escrow agreement (the "Escrow Agreement" or, collectively with the Settlement Agreement, the "Securities Contracts"). (Dkt. 60-8.)

Because Merit was a 30.007% owner of Bedford Downs, Valley View ultimately transferred $16,503,850

to it (the "Transfers"). Valley View's financial arrangements relating to the Transfers were complex and involved multiple entities. As is relevant here, Valley View made the Transfers through Credit Suisse and Citizens Bank of Pennsylvania ("Citizens Bank"). Credit Suisse acted as an escrow agent on behalf of Valley View and distributed the funds pursuant to the terms of (1) certain credit agreements between Valley View and Credit Suisse and (2) the Escrow Agreement. Citizens Bank held the Transfers in escrow pursuant to the terms of the Escrow Agreement until the transaction closed and then distributed the funds to Merit.

With Bedford Downs out of the running, the Racing Commission granted Valley View's application for a harness-racing license. Valley View's desire to open a "racino," however, faltered at the gate as Valley View was unable to secure a gaming license. Without the gaming license, Valley View could not go the distance and thus sought relief under Chapter 11 of the Bankruptcy Code.

The bankruptcy court ultimately confirmed Valley View's Chapter 11 plan. The Centaur, LLC Litigation Trust was created pursuant to the confirmed plan, and FTI Consulting, Inc. was selected to serve as the Litigation Trustee. The confirmed plan contemplated that the Trustee would pursue certain claims – the "Designated Avoidance Actions" – to benefit certain creditors of Valley View. After convoluted proceedings before multiple bankruptcy courts, the flag is raised to determine Merit's motion for judgment on the pleadings, which is based on Merit's contention that § 546(e) of

the Bankruptcy Code bars the Trustee's attempt to avoid the Transfers pursuant to the Bankruptcy Code.[1]

II. LEGAL STANDARD

In ruling on a motion for judgment on the pleadings pursuant to Rule 12(c), when the movant seeks "to dispose of the case on the basis of the underlying substantive merits . . . . the appropriate standard is that applicable to summary judgment, except that the court may consider only the contents of the pleadings." *Alexander v. City of Chi.*, 994 F.2d 333, 336 (7th Cir. 1993). The pleadings include the complaint, the answer, and any documents attached as exhibits, such as affidavits, letters, and contracts. *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452-53 (7th Cir. 1998). The court may also take judicial notice of "documents that are critical to the complaint and referred to in it." *Geinosky v. City of Chi.*, 675 F.3d 743,

---

[1] The Trustee's complaint appears to seek relief under state fraudulent transfer law. For example, Count II is entitled "avoidance of fraudulent transfer (11 U.S.C. § 544 & Pennsylvania Uniform Transfer Act § 5105." (Compl., Dkt. 1.) In that count, the Trustee alleges that the Transfers are "avoidable under Pennsylvania law by actual creditors holding allowable unsecured claims against Valley View Downs." (*Id.* ¶ 55.) Nevertheless, in its opposition to the motion for judgment on the pleadings, the Trustee states that it "has not asserted any state law claims on behalf of creditors, but rather debtor claims under § 544." (Trustee Resp., Dkt. 65, at 1.) Based on this position, the Trustee did not address Merit's arguments about preemption of any state law claim. Given the Trustee's abandonment of any state law claims, the court considers them withdrawn and thus will not address preemption.

745 n. 1 (7th Cir. 2012). The court should grant a Rule 12(c) motion for judgment on the pleadings only if "no genuine issues of material fact remain to be resolved" and the movant "is entitled to judgment as a matter of law." *Alexander*, 994 F.2d at 336.

Merit has provided the court with documents relating to the sale of Bedford Downs' shares to Valley View, including transactional documents showing the conduits through which the transaction was made. Merit contends that these documents are properly before the court as the Trustee's complaint repeatedly refers to the transaction. (Merit's Memo., Dkt. 60, at 5, n.3.) The Trustee disagrees but does not dispute that certain documents relating to the transaction (discussed above) are admissible and relevant. Given that no party objects to the court's consideration of these documents, the court will do so.

III. DISCUSSION

"The Bankruptcy Code allows a trustee to avoid and recover pre-petition fraudulent and preference transfers made by a debtor." *In re MCK Millennium Ctr. Parking, LLC*, 532 B.R. 716, 726-27 (Bankr. N.D. Ill. 2015). Section 546(e) of the Bankruptcy Code, however, provides a "safe harbor" by barring a trustee from avoiding certain transfers. 11 U.S.C. § 546(e). The "safe harbor" protects, among other transfers:

- "a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or
- a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract . . . .

11 U.S.C. § 546(e).[2]

The Trustee does not dispute that the Transfers were "settlement payments" or that they were made "in connection with a securities contract." (Trustee Resp., Dkt. 65, at 1.) Commercial banks such as Credit Suisse and Citizens Bank are financial institutions.

---

[2] 11 U.S.C. § 546(e) provides in full that:

Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

See In re MCK Millennium Ctr. Parking, LLC, 532 B.R. 716, 727 (Bankr. N.D. Ill. 2015) (citing 11 U.S.C § 101(22)(A)). Thus, the applicability of § 546(e) in this case turns on the meaning of the phrase "by or to (or for the benefit of) . . . a financial institution."

Merit (the recipient of the Transfers that the Trustee seeks to avoid) argues that the Transfers were made "by or to" a financial institution (here, Credit Suisse and Citizens Bank) because financial institutions transferred and received funds in connection with the Transfers. In contrast, the Trustee asserts that § 546(e)'s requirement that a transfer be "by or to" a financial institution applies only to a financial institution that is (1) a debtor-transferor; (2) a transferee that is not a mere conduit; or (3) an entity on whose behalf the transfer was made. The Trustee contends that the financial institutions had no beneficial interest in the funds; Valley View was the debtor-transferor and the entity on whose behalf transfer was made, Merit was the transferee, and neither Valley View nor Merit is "a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." Thus, the Trustee concludes that § 546(e)'s "safe harbor" does not shield the Transfers.

A. Guidance From The Seventh Circuit

The circuits are split on the issue presented in this case. The Seventh Circuit has not weighed in on § 546(e)'s requirement that a transaction be "by or to

(or for the benefit of) . . . a financial institution" but has construed other language in § 546(e). It has held that "Congress enacted § 546(e) to ensure that honest investors will not be liable if it turns out that a leveraged buyout (LBO) or other standard business transaction technically rendered a firm insolvent." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 748 (7th Cir. 2013). As the Seventh Circuit has explained, without § 546(e):

> one firm's bankruptcy could cause a domino effect as its clients could similarly default on their obligations, which in turn would trigger further bankruptcies, and so on. By preventing one large bankruptcy from rippling through the securities industry in this way, the § 546(e) safe harbor protects the market from systemic risk and allows parties in the securities industry to enter into transactions with greater confidence.

Grede v. FCStone, LLC, 746 F.3d 244, 252 (7th Cir. 2014).

In interpreting § 546(e), the Seventh Circuit has followed what it views as the statute's plain language; "[t]he text is what it is and must be applied whether or not the result seems equitable." *Peterson*, 729 F.3d at 748 (citing *Freeman v. Quicken Loans, Inc.*, ___ U.S. ___, 132 S.Ct. 2034, 2044, 182 L.Ed.2d 955 (2012)); *Grede*, 746 F.3d at 253. The Seventh Circuit has emphasized that this reliance on the statutory language does not mean that it has "appl[ied] a wooden textualism to the issue." *Grede*, 746 F.3d at 253. Instead, it has declined

"to depart from the deliberately broad text of § 546(e)" because:

> [s]ection 546(e) applies only to the securities sector of the economy, where large amounts of money must change hands very quickly to settle transactions. Those dealing in securities have an interest in knowing that a deal, once completed, is indeed final so that they need not routinely hold reserves to cover the possibility of unwinding the deal if a counter-party files for bankruptcy in the next 90 days. Also, even a short term lack of liquidity can prove fatal to a commodity broker or other securities business.

Id.

With these precepts in mind, the court turns to decisions from other circuits, a decision by a bankruptcy judge in this district, and decisions of other district courts that address the meaning of the phrase "by or to (or for the benefit of) . . . a financial institution."

B. The Minority Position

The court begins with the Eleventh Circuit's decision in *Matter of Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996). In that case, the Eleventh Circuit considered whether § 546(e) protected payments made to selling shareholders in connection with a leveraged buyout when the financial institutions involved in the transactions did not have a beneficial interest in the payments. A divided panel of the Eleventh Circuit held

that § 546(e) is inapplicable if a financial institution involved in a transaction is a "intermediary or conduit" because a trustee may only avoid a transfer to a "transferee" that is a protected entity listed in § 546(e) and has a beneficial interest in the assets at issue.[3] *Id.* (citing 11 U.S.C. § 550, which addresses a transferee's liability for an avoided transfer). The dissenting judge in *Munford*, however, stated that the requirement that a financial institution have a beneficial interest in a settlement payment "created a new exception to [the] application [of § 546(e)]." *Id.* (Hatchett, C.J., dissenting in part).

C. The Majority Position

Numerous courts have rejected the *Munford* majority's interpretation of "by or to (or for the benefit of) . . . a financial institution" and have held that a financial intermediary involved in a transaction implicates the safe harbor protection in § 546(e) even if it acts as an intermediary or conduit. Specifically:

---

[3] Presumably, Credit Suisse and Citizens Bank, the banks involved in the transactions at issue in this case, are for-profit entities. The parties have not addressed whether a bank that obtains a financial benefit due to, for example, float, has a beneficial interest in that transaction that is sufficient to invoke § 546(e). The court will not consider this issue further as it is unremarked by the parties, but notes that it is unclear if Credit Suisse and Citizens Bank in fact obtained no benefit from their roles in transactions totaling millions of dollars.

- **Second Circuit**

Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 338-39 (2d Cir. 2011) – Enron argued that a financial intermediary that acted as a record keeper and conduit was outside the scope of § 546(e) because it did not take title to the securities at issue during the transaction. Enron thus reasoned that the transaction "did not implicate the systemic risks that motivated Congress's enactment of the safe harbor." The Second Circuit disagreed, holding that § 546(e)'s safe harbor was available because "undoing Enron's redemption payments, which involved over a billion dollars and approximately two hundred noteholders," would have "a substantial and similarly negative effect on the financial markets." *Id.* at 338. The Second Circuit also held that a financial intermediary that does not take title to securities during a transaction is entitled to safe harbor protection. *Id.* at 339.

In re Quebecor World (USA) Inc., 719 F.3d 94, 99-100 (2d Cir. 2013) – In *Quebecor*, the Second Circuit reaffirmed *Enron*'s holding that a financial intermediary need not have a beneficial interest in a transfer to be protected by § 546(e). It focused on the statute's plain language and held that to prevent portions of the statute from becoming superfluous, "a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* It also found that this construction furthered the purpose behind

§ 546(e)'s safe harbor because transactions involving financial intermediaries acting as a [sic] conduits necessarily involve at-risk markets. *Id.* at 100. Finally, it stated that the protected entities listed in § 546(e) typically facilitate transfers. For this reason, "[a] clear safe harbor for transactions made through these financial intermediaries promotes stability in their respective markets and ensures that otherwise avoidable transfers are made out in the open, reducing the risk that they were made to defraud creditors." *Id.*

- **Third Circuit**

  In re Resorts Int'l, Inc., 181 F.3d 505, 515 (3d Cir. 1999) – In *Resorts*, Merrill Lynch, a broker, and Chase Manhattan, a bank, were involved in a securities transaction. The Third Circuit held that Merrill Lynch and Chase were "financial institutions" that were within the ambit of § 546(e) "[u]nder a literal reading of [that statute]." *Id.* The Third Circuit held that [sic] the dissent in *Munford* was more persuasive that the majority opinion because § 546(e) does not specify that the safe harbor is available only when the financial institution has a "beneficial ownership" in the funds at issue. *Id.* at 516.

  In re Plassein Int'l Corp., 590 F.3d 252, 257 (3d Cir.2009) – In *Plassein*, the Third Circuit again rejected *Munford*, reaffirmed *Resorts*, and held that a bank that acts as a conduit is protected by § 546(e)'s safe harbor.

- **Sixth Circuit**

  In re QSI Holdings, Inc., 571 F.3d 545, 550 (6th Cir. 2009) – In *QSI Holdings*, the plaintiffs argued that a transaction was not "made by or to a . . . financial institution" because the bank "never had dominion or control over [the] funds." The Sixth Circuit adopted *Resorts'* rejection of *Munford* and held that § 546(e) protects financial institutions that do not have a beneficial interest in the funds at issue.

- **Eighth Circuit**

  Contemporary Indus. Corp. v. Frost, 564 F.3d 981 (8th Cir. 2009) – In *Contemporary Industries*, the Eighth Circuit acknowledged *Munford* but adopted the Third Circuit's reasoning in *Resorts* and held that "the holding in Munford cannot be squared with § 546(e)'s plain language." *Id.* at 987. The Eighth Circuit based this conclusion on, among other things, "a literal reading of the relevant statutory language" and the fact that a bank was involved in the transaction. *Id.* The Eighth Circuit also noted that the statutory language "plainly and unambiguously encompasse[d]" the payments at issue. *Id.* Finally, the Eighth Circuit rejected the plaintiff's contention that reversing the payments at issue would not impact the stability of the financial markets and that following the Third Circuit's approach would lead to an absurd result. *Id.* at 987-88. In support, the Eighth Circuit explained that

it could "see how Congress might have believed undoing" a transaction involving $26.5 million would affect the financial markets and "why Congress might have thought it prudent to extend protection to payments such as these." *Id.* Thus, the Eighth Circuit found that the payments at issue were shielded by § 546(e)'s safe harbor.

- **Tenth Circuit**

  In re Kaiser Steel Corp., 952 F.2d 1230 (10th Cir. 1991) – In *Kaiser Steel*, the party challenging the application of § 546(e)'s safe harbor for financial institutions argued that § 546(e) did not protect settlement payments "by a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system," as opposed to shareholders who are not protected parties. *Id.* at 1240. The Tenth Circuit held that the statutory language clearly and unambiguously exempted payments made "by or to" a protected party and that this interpretation was neither absurd nor otherwise unreasonable. *Id.* at 1240-41. It also declined to "replace the unambiguous language of the provision with clues garnered from the legislative history" stating that '[c]ertainly, we cannot say that the clear application is absurd, given the fact that disruption in the securities industry – an inevitable result if leveraged buyouts can freely be unwound years after they occurred – is also a

harm the statute was designed to avoid." *Id.* at 1241.

D. District and Bankruptcy Court Decisions

Most district and bankruptcy court decisions interpreting "made by or to a . . . financial institution" are in accord with the majority position and disagree with the Eleventh Circuit's decision in *Munford*. *See In re D.E.I. Sys., Inc.*, 996 F. Supp. 2d 1142, 1146 (D. Utah 2014) (following the Tenth Circuit's decision in *Kaiser Steel* and concluding that " 'by or to' means just that – payments made either by or to a financial institution. The understanding and application of the phrase does not generally require careful parsing or close semantic scrutiny."); *In re Refco, Inc. Sec. Litig.*, No. 07 MDL 1902 GEL, 2009 WL 7242548, at *8 (S.D.N.Y. Nov. 13, 2009), report and recommendation adopted by 2010 WL 5129072 (S.D.N.Y. Jan. 12, 2010) ("The predominant view in the Circuits – that 'financial institution' means what it says and covers financial institutions even when they act only as a conduit for a settlement payment – is cogent and persuasive."); *In re Hechinger Inv. Co. of Delaware*, 274 B.R. 71, 87 (Bankr. D. Del. 2002) (disagreeing with *Munford* and following binding authority in *Resorts International* holding that the plain language of § 546(e) "does not require the financial institution to acquire a beneficial interest; rather, it broadly protects from trustee's avoidance powers settlement payments made "by . . . a financial institution").

A bankruptcy court in this circuit has considered the precise issue before this court – whether a financial institution that serves as a conduit or intermediary is entitled to safe harbor protection. *MCK Millennium Ctr. Parking*, 532 B.R. at 728. In *MCK Millennium*, the court recognized the circuit split and held that the majority position was "the better view" because § 546(e) does not contain "the additional requirement that the financial institution receive some financial benefit or acquire the funds for its own use." *Id.* It then "[applied] the text as written" and concluded that § 546(e)'s safe harbor applied to a $5M transaction where the funds were transferred to a financial institution which then transferred the funds to a trust. *Id.*

Finally, a bankruptcy decision from Massachusetts issued shortly before the Eleventh Circuit's decision in *Munford* supports the minority view. *In re Healthco Int'l, Inc.*, 195 B.R. 971, 982 (Bankr. D. Mass. 1996). This decision is consistent with *Munford*.

E. The Trustee's Arguments

First, the Trustee contends that the court must consider the language in § 546(e) "within the context of both its purpose and Chapter 5 of the Bankruptcy Code."[4] (Trustee Resp., Dkt. 65, at 4.) It then argues that the legislative history shows that the safe harbor

---

[4] "Chapter 5 of the Bankruptcy Code gives trustees certain avoidance powers and enables them to recover assets for the benefit of creditors." *In re Bilis*, No. 12 B 39161, 2014 WL 3697541, at *7 (Bankr. N.D. Ill. July 22, 2014).

does not protect a financial institution unless unraveling the transaction would expose the securities market to systemic risk. (*Id.* at 4-7.) It also contends that the legislative history shows that Congress meant to protect participants in the commodities and securities markets, not other potential fraudulent transfer defendants, such as financial institutions that facilitate transactions. (*Id.* at 11-12.)

These arguments are at odds with the Seventh Circuit's teaching that unambiguous statutory language is controlling. The Transfers here were "by or to" a financial institution because two financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." *See Kaiser Steel*, 952 F.2d at 1240-41; *Resorts Int'l.*, 181 F.3d at 515; *Enron Creditors Recovery Corp.*, 651 F.3d at 338-39; *Contemporary Indus.*, 564 F.3d at 987-88; *QSI Holdings*, 571 F.3d at 550; *Plassein Int'l*, 590 F.3d at 257; *Quebecor World*, 719 F.3d at 99-100; *see also MCK Millennium Ctr. Parking*, 532 B.R. at 728; *D.E.I. Sys., Inc.*, 996 F. Supp. 2d at 1146; *Refco, Inc. Sec. Litig.*, 2009 WL 7242548, at *8; *Hechinger Inv. Co.*, 274 B.R. at 87.

The Seventh Circuit's observation, when parsing a different clause in § 546(e), that "a court can't say 'this statute is ambiguous, so we will implement the legislative history unencumbered by enacted text'" is apropos. *Peterson*, 729 F.3d at 748 (citing *Freeman v. Quicken Loans, Inc.*, ___U.S. ___, 132 S.Ct. 2034, 2044, 182 L.Ed.2d 955 (2012)). Legislative history can be helpful when interpreting ambiguous language, but

should be "used to decipher the ambiguous language, not to replace it." *Id.*; *see also Grede*, 746 F.3d at 253 (describing the district court's reliance on policy grounds when interpreting § 546(e) as "powerful and equitable" but reversing because the district court's "reasoning runs directly contrary to the broad language of § 546(e)"). The court agrees that the clear statutory text is unambiguous and, therefore, must control. Thus, it rejects the Trustee's policy arguments.

Second, the Trustee contends that Chapter 5 of the Bankruptcy Code "gives trustees the right to avoid prepetition transfers made by a debtor to a transferee or an entity for whose benefit such transfer was made." (Trustee Resp., Dkt. 65, at 10.) The Trustee argues that Chapter 5's purpose supports its own purportedly plain language reading of "by, to, and for the benefit of": that § 546(e) only protects "(i) the debtor-transferor, (ii) a transferee, or (iii) an entity for whose benefit the transfer was made." (*Id.* at 8.) The Trustee asserts that any other reading of "by or to" would render the words "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency" in § 546(e) superfluous because "it is difficult to imagine circumstances where a 'settlement payment' or 'a transfer in connection with a securities contract' does not somehow involve . . . the debtor's or tranferee's [sic] bank." (*Id.* at 10.) The Trustee concludes that "if Congress wanted to protect all settlement payments and transfers made in connection with a securities contract from avoidance

(which it did not), it would have been unnecessary to specifically identify" entities covered by § 546(e.) (*Id.*)

This court finds the Trustee's suggested "plain meaning" strained. At the risk of being obvious, a transfer that is "by or to" a financial institution is just that: a transfer where a financial institution sends or receives funds. The court will not repeat its summary of the majority position cases above regarding "by or to" but finds them sensible and, more to the point, solidly grounded in the statutory language. Even if the court agreed with the Trustee's reading of "by or to" (which is not the case), the court cannot use its own assessment of Congressional intention to rewrite the words in § 546(e). *See Peterson*, 729 F.3d at 748; *Grede*, 746 F.3d at 253.

Third, the Trustee approaches the statutory issue from a different angle, focusing on the word "transfer" in § 546(e). 11 U.S.C. § 546(e) ("the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency . . . "). The Trustee posits that the financial institutions here cannot have engaged in covered transfers because they are not "transferees" or "transferors" as those terms are used in the Bankruptcy Code since they lacked an interest in the funds. *See Munford*, 98 F.3d at 610-11; *Healthco Int'l*, 195 B.R. at 981-82.

The word "transfer" in the context of § 546(e) appears to refer to the movement of assets. *See Grede*,

746 F.3d at 246 (stating that "[t]hese appeals focus on two transfers of assets" that the trustee is seeking to avoid under § 546(e)). Moreover, the Seventh Circuit has held that § 546(e) reflects Congress' decision to favor "finality over equity for most pre-petition transfers in the securities industry – *i.e.*, those not involving actual fraud." *Grede*, 746 F.3d at 253. Section 546(e) thus "reflects a policy judgment by Congress that allowing some otherwise avoidable pre-petition transfers in the securities industry to stand would probably be a lesser evil than the uncertainty and potential lack of liquidity that would be caused by putting every recipient of settlement payments in the past 90 days at risk of having its transactions unwound in bankruptcy court." *Id.* at 254. The court adheres to the Seventh Circuit's use of "transfer" as a verb, as opposed to the Trustee's reading, which saddles § 546(e) with a pecuniary interest requirement. *See id.*

Finally, the Trustee argues that the circuit split is "largely" based on the majority courts' rejection of unnecessary dicta in *Munford* rather than an in-depth analysis of § 546(e)'s language. (Trustee Resp., Dkt. 65, at 13.) According to the Trustee, courts that espouse the minority position (*Munford* and *Heathco Int'l*) based their decision on a finding that § 546(e) did not bar an avoidance action because "[a]lthough financial intermediaries were necessarily involved in the transaction[s], . . . the transfers were made "by [the debtor] to shareholders." (*Id.* at 14.) The Trustee contends that the minority courts' additional statement that the entities seeking the safe harbor were not "transferees" or

"transferors" because they had no beneficial interest in the transferred funds was dicta that caused the circuit split. (*Id.*)

This argument is a non-starter. The majority position relies on, among other things, a plain language reading of § 546(e) (with which the court agrees) and sides with the *Munford* dissent. The Trustee's view that the majority position fails to take a "holistic" view of § 546(e) is simply another iteration of its legislative history arguments, which rely on the Trustee's interpretation of congressional intent rather than the statutory language.

In sum, Merit is entitled to § 546(e)'s safe harbor. This means that the Trustee cannot avoid the Transfers. Merit's motion for judgment on the pleadings is, therefore, granted.

IV. CONCLUSION

For the above reasons, Merit's motion for judgment on the pleadings [58] is granted. The clerk is directed to enter final judgment accordingly.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 30, 2016

Before

DIANE P. WOOD, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 15-3388

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust, *Plaintiff-Appellant,* *v.* MERIT MANAGEMENT GROUP, LP, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:11-cv-07670 Joan B. Gottschall, *Judge.*

ORDER

Defendant-Appellee filed a petition for rehearing *en banc* on August 11, 2016. No judge in regular active service has requested a vote on the petition for rehearing *en banc,* and all members of the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc is* DENIED.

Relevant Statutory Provisions

11 U.S.C. § 101

In this title the following definitions shall apply:

. . . .

(22) The term "financial institution" means –

(A) a Federal reserve bank or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer" as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

. . . .

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

. . . .

11 U.S.C. § 544

. . . .

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. § 548

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which –

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer or contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

. . . .

11 U.S.C. § 741

In this subchapter –

. . . .

(7) "securities contract" –

(A) means –

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such

repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in section 101);

. . . .

(B) does not include any purchase, sale or repurchase obligation under a participation in a commercial mortgage loan;

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade; . . .

. . . .

RECORD AND BRIEFS

No. 16-784

FILED
JAN 19 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

BARBARA WHITEN BALLIETTE
Counsel of Record
WILLIAM T. REID, IV
GREGORY S. SCHWEGMANN
JOSHUA J. BRUCKERHOFF
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Highway,
Building C, Suite 300
Austin, Texas 78746
(512) 647-6100
bballeiette@rctlegal.com

Counsel for Respondent

QUESTION PRESENTED

Whether 11 U.S.C. § 546(e) prohibits the avoidance of a settlement payment or a transfer made in connection with a securities contract where neither the debtor nor the transferee (or entity for whose benefit the transfer was made) is a financial institution or other entity named in the statute but where the transfer passed through such an entity as a conduit.

RULE 29.6 STATEMENT

Respondent FTI Consulting, Inc., has no corporate parent and no publicly held company owns 10% or more of the company.

TABLE OF CONTENTS

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
A. Statutory Framework 1
B. Factual Background 2
C. Proceedings Below 4
REASONS FOR DENYING THE PETITION 6
A. The Question Presented Does Not Merit Review. 6
B. Petitioner Misstates the Seventh Circuit's Opinion. 14
C. The Court Should Not "Hold" Merit's Petition 16
CONCLUSION 18
RELEVANT STATUTORY PROVISIONS ..... App. 1

TABLE OF AUTHORITIES

Cases

Contemporary Industries Corp v. Frost,
564 F.3d 981 (8th Cir. 2009).....10

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989).....5, 16

Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....5

In re Tribune Co. Fraudulent Conveyance Litig.,
818 F.3d 98 (2d Cir. 2016).....11, 13, 14

Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.),
952 F.2d 1230 (10th Cir. 1991).....7, 8

King v. Burwell,
135 S.Ct. 2480 (2015).....13

Lowenschuss v. Resorts International, Inc. (In re Resorts International, Inc.),
181 F.3d 505 (3d Cir 1999).....9, 10

Munford v. Valuation Research Corp. (In re Munford, Inc.),
98 F.3d 604 (11th Cir. 1996).....8, 9, 10

Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. v. American United Life Insurance Co. (In re Quebecor World USA Inc.),
719 F.3d 94 (2d Cir. 2013).....10, 11

Quality Stores, Inc. v. Alford (In re QSI Holdings Inc.),
571 F.3d 545 (6th Cir. 2009).....10

Straight v. Wainwright,
476 U.S. 1132 (1986) 17

Statutes

11 U.S.C. § 546(e) 1
11 U.S.C. § 547 1
11 U.S.C. § 548 1
11 U.S.C. § 548(a)(2) 16
11 U.S.C. § 550 1
11 U.S.C. § 548(d)(2) 16

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions included in the appendix to the petition, § 550 of the Bankruptcy Code is reproduced at Resp. App. 1–3.

STATEMENT

A. Statutory Framework

Chapter 5 of the Bankruptcy Code provides a trustee with broad powers to avoid and recover pre-petition transfers of property in which the debtor had an interest for the benefit of the creditors. These powers are part of a larger statutory scheme designed to ensure the equitable distribution of the estate's property to its creditors. (Pet. App. 7). The trustee's powers to avoid and recover pre-petition transfers are codified in §§ 544, 547, 548, and 550 of the Bankruptcy Code.[1]

Section 546(e) of the Bankruptcy Code provides a broad, but not limitless, exception to these avoidance powers.[2] In short, § 546(e) provides a safe harbor from fraudulent transfer liability to certain enumerated entities by prohibiting a trustee from avoiding:

> A margin payment or settlement payment made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities

---

[1] *See* 11 U.S.C. §§ 544, 547, 548, & 550.

[2] *Id.* § 546(e).

> clearing agency (collectively referred to herein as "Protected Entities"); OR
>
> A transfer made by or to (or for the benefit of) a Protected Entity in connection with a securities contract.[3]

The application of the safe harbor here turns on the meaning of the statutory phase "made by or to (or for the benefit of)."

B. Factual Background

This case arises out of the bankruptcy of Valley View Downs, L.P. ("Valley View Downs"), one of the debtors in *In re Centaur, LLC et al.*, jointly administered under Case No. 10-10799 in the United States Bankruptcy Court for the District of Delaware (the "Centaur Bankruptcy Case"). (Pet. App. 3). Plaintiff–Respondent FTI Consulting, Inc. (the "Trustee") brought this action in the District Court for the Northern District of Illinois in its capacity as the trustee of the Centaur, LLC Litigation Trust (the "Litigation Trust"). (*Id.*). The Litigation Trust was formed pursuant to the plan of reorganization that was confirmed in the Centaur Bankruptcy Case (the "Confirmed Plan"). (*Id.* at 21). Pursuant to the terms of the Confirmed Plan and the Litigation Trust Agreement, Valley View Downs assigned and transferred certain avoidance actions against Defendant–Petitioner Merit Management Group, L.P. ("Merit") to the Litigation Trust. (*Id.*). The Trustee filed suit against Merit on October 27, 2011, asserting

---

[3] *Id.*

two causes of action for the avoidance and recovery of a $16,503,850 transfer made by the debtor, Valley View Downs, to Merit as constructively fraudulent under §§ 544, 548(a)(1)(B), and 550 of the Bankruptcy Code. (*Id.* 3).

The transfers at issue were made in connection with a settlement agreement between Valley View Downs and Bedford Downs Management Corporation ("Bedford Downs"). (*Id.* at 20). The terms of the settlement agreement required, among other things, for Valley View Downs to purchase all of Bedford Downs' outstanding shares from its shareholders for a total of $55 million in exchange for Bedford Downs' agreement to bow out of the ongoing competition for the last harness racing license available in Pennsylvania. (*Id.*). On October 30, 2007, pursuant to the terms of this agreement, Valley View Downs transferred $55 million to the shareholders of Bedford Downs, including a transfer of $16,503,850 to Merit as a 30.007% owner of Bedford Downs. (*Id.*).

The undisputed facts relevant to whether the § 546(e) safe harbor applies in this case can be summarized as follows:

1. Valley View Downs transferred $16,503,850 to Merit as consideration for its shares in Bedford Downs (the "Transfers").

2. The Transfers were either settlement payments or made in connection with a securities contract.

3. The Transfers were made *by* Valley View Downs *to* Merit *through* Credit Suisse and Citizens Bank of Pennsylvania ("Citizens Bank"). Credit

Suisse and Citizens Bank acted solely as conduits in the transaction.

4. Neither Valley View Downs (the debtor) nor Merit (the transferee) is, or ever was, a "financial institution" as defined by the Bankruptcy Code.

C. Proceedings Below

In its motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, Merit argued that the Transfers were protected from avoidance by the § 546(e) safe harbor. (*Id.* at 19–21). The District Court agreed. (*Id.* at 39). In granting Merit's motion, the District Court found that the Transfers were "made by or to" a financial institution because, the court reasoned, the funds passed *through* at least two financial institutions—Credit Suisse and Citizens Bank—on their way to Merit. (*Id.* at 37). Based upon this finding, the District Court held that the Transfer was protected from avoidance by the "plain meaning" of § 546(e) of the Bankruptcy Code. (*Id.*).

FTI appealed the decision. After considering over a hundred pages of briefing on the single issue of the meaning of the statutory phrase "made by or to (or for the benefit of)" and hearing oral argument, the Seventh Circuit reversed the District Court and remanded the case. (*Id.* at 18). Specifically, the Seventh Circuit held that § 546(e) does not provide a safe harbor to transfers that merely pass *through* a financial institution or other Protected Entity where neither the debtor nor the defendant–transferee are themselves Protected Entities. (*Id.*)

The Seventh Circuit began its analysis with the relevant statutory language to determine whether its meaning, *i.e.*, the intent of Congress, was clear on its face. (*Id.* at 5). Because the express statutory language has several plausible meanings, the Seventh Circuit determined that the meaning of the statute is ambiguous. (*Id.* at 5–6). Thus, it turned to the context and purpose of the statute to choose between the competing interpretations. (*Id.* at 7 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d. 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their overall place in the statutory scheme.")).

In doing so, the Seventh Circuit first analyzed § 546(e) within the context and purpose of the statutory provisions to which the safe harbor provides an exception—namely, the avoidance provisions found in §§ 544, 547, and 548. (Pet. App. 7–9). The court concluded that "Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance—logically, these are two sides of the same coin." (*Id.* at 8).

Next, the court compared the language of various provisions of chapter 5 and other sections of the Bankruptcy Code to the language used in § 546(e) to ensure it was interpreting the statute "as a symmetrical and coherent regulatory scheme." (*Id.* at 7 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Specifically, the court examined the language, purpose, and context of §§ 548(a)(1),

548(c), 548(d)(2), 548(a)(2), 550, 555, 365(e), and 362(a). (Pet. App. 9–13). From its review of the relevant statutory framework, the court concluded that, in enacting § 546(e), Congress was concerned with the economic substance of transactions—not the manner in which transactions are consummated. (*Id.* at 12).

Finally, to complete its analysis, the Seventh Circuit examined the history of the § 546(e) safe harbor and the particular risk Congress was responding to by enacting it. (*Id.* at 13–14). After doing so, the court concluded that its interpretation of § 546(e)—*i.e.*, that it does not cover all "transactions involving securities that uses a financial institution or other named entity as a conduit for funds"—is consistent with the safe harbor's legislative history. (*Id.* at 14–16).

REASONS FOR DENYING THE PETITION

A. The Question Presented Does Not Merit Review.

Petitioner's claim that the circuits are deeply divided on the proper meaning of the words "made by or to (or for the benefit of)" found in § 546(e) is not supported by the relevant case law. (Pet. 9). Although several courts have nominally passed on this issue, this case represents the first decided by any circuit court where the interpretation of the statutory language "by or to (or for the benefit of)" was the sole issue considered and addressed. Indeed, the Seventh Circuit is the only circuit court of appeal that has fully analyzed the relevant statutory language by placing it

within the purpose and context of chapter 5 of the Bankruptcy Code as a whole.

As demonstrated below, no other circuit court has given the relevant statutory language the attention necessary to fully address the issue presented here. As such, this issue should be allowed to percolate back up to the circuit courts that have already ruled on it, albeit in a cursory fashion, so that they may reconsider the issue with the benefit of the detailed analysis performed by the Seventh Circuit. Simply put, given the recency of the Seventh Circuit's opinion, a review of this issue would be premature.

No court, other than the Seventh Circuit, has analyzed the statutory language of § 546(e) under the simple and undisputed facts presented here. The Tenth Circuit was the first to address this issue in *Kaiser Steel*.[4] There, the contested transfers passed through numerous financial intermediaries on their way from the debtor to the debtor's former shareholders.[5] Although, based upon these facts, the court concluded that § 546(e) barred the avoidance of the transfers received by the shareholders, the Tenth Circuit was never presented with the question presented here—*i.e.*, whether § 546(e) applies where neither the debtor nor the transferee is a Protected Entity. This is because the Kaiser trustee admitted that the transfers at issue were "made by" a stockbroker (*i.e.*, a Protected Entity), *not* by the debtor. Given this admission, the applicability of the

---

[4] *Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230, 1235 (10th Cir. 1991).

[5] *Id.* at 1235–36.

safe harbor was clear and the trustee was left to take the dubious position that by using the phrase "by *or* to" Congress meant "by *and* to."[6] Based upon the trustee's admission and flawed argument, the court applied § 546(e) to bar the avoidance of the contested transfers.[7]

The majority of the case law on the meaning of "by or to" as used in § 546(e), however, developed in the wake of the Eleventh Circuit's opinion in *In re Munford, Inc.*[8] In *Munford* the trustee brought claims to avoid transfers made by Munford to its shareholders in connection with a leveraged buyout.[9] The court recognized that "a section 546(e) financial institution was presumptively involved in the transaction."[10] Nevertheless, the court held that § 546(e) did not apply because neither the debtor nor the transferees (*i.e.*, the shareholders) were entities protected by the statute.[11] The court reached this conclusion by citing § 550 of the Bankruptcy Code for the uncontroversial proposition that "a trustee may only avoid a transfer to a 'transferee,'" and Eleventh Circuit case law for the definition of "transferee."[12] In

---

[6] *Id.* at 1240 (stating that Kaiser argued that "§ 546(e) does not protect a settlement payment 'by' a stockbroker" unless the payment is also made "to another participant in the clearance and settlement system").

[7] *Id.* at 1241.

[8] *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604 (11th Cir. 1996).

[9] *Id.* at 607.

[10] *Id.* at 602.

[11] *Id.*

[12] *Id.*

doing so, the court determined that the financial institutions involved in the transaction were not "transferees," and thus irrelevant to the § 546(e) analysis, because, parroting the Eleventh Circuit standard, "the banks never acquired a beneficial interest in the funds."[13] Although that was the extent of the court's analysis, this was the only other circuit court that has even attempted to read § 546(e) in a manner consistent with the remainder of the chapter 5 of the Bankruptcy Code.

The dissent in *Munford* latched on to the "beneficial interest" language used by the majority to define a "transferee," mischaracterized its role in the majority's analysis, and then rejected it without a single citation.[14] The dissent did not even attempt to engage in any analysis of the statutory language.[15] Rather, the dissent was based solely on the unsupported "belief" that the majority was trying to "create a new exception to [the] application" of § 546(e).[16] Due to the lack of focused attention on this issue in the few cases that followed, this unsupported "belief" found its way into the jurisprudence of the Second, Third, Sixth, and Eighth Circuits during the ensuing decades.

The next circuit court to address the meaning of the words "by or to" was the Third Circuit in *In re*

---

[13] *Id.*

[14] *Id.* at 614 (dissent).

[15] *Id.*

[16] *Id.*

Resorts International.[17] The *Resorts* court, however, simply adopted, with no analysis of its own, the two-sentence dissent from *Munford*.[18] Shortly thereafter, the Second, Sixth, and Eighth Circuits, also with no analysis of § 546(e)'s language in the context of chapter 5, simply adopted the holding in *Resorts*. In relying on *Resorts*, none of these other circuit courts added to the *Munford* dissent's "analysis" of the statutory language:

- *Contemporary Industries Corp v. Frost*.[19] The Eighth Circuit, after reciting the opinion of the *Munford* majority, rejected it by citing *Resorts*.[20]

- *Quality Stores, Inc. v. Alford (In re QSI Holdings Inc.)*.[21] The Sixth Circuit rejected the *Munford* majority without any of its own analysis by citing both *Resorts* and *Contemporary Industries*.[22]

- *Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. v. American United Life Insurance Co. (In re Quebecor World USA Inc.)*.[23] The Second Circuit simply followed "the

---

[17] *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505 (3d Cir 1999).

[18] *Id.* at 516.

[19] 564 F.3d 981 (8th Cir. 2009).

[20] *Id.* at 987–88.

[21] 571 F.3d 545 (6th Cir. 2009).

[22] *Id.* at 551.

[23] 719 F.3d 94 (2d Cir. 2013).

> Third, Sixth, and Eighth Circuits in holding that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit."[24] The court then relied on legislative history to summarily conclude that "a transaction involving one of these financial intermediaries, even as conduit, necessarily touches upon these at-risk markets."[25] In doing so, however, the court altogether failed to explain what part of the statutory text states that the safe harbor applies when a transfer "touches upon" at-risk markets.[26]

Finally, the most recent circuit court to address this issue, outside of the Seventh Circuit, was the Second Circuit in *Tribune*.[27] In that case, however, the court examined the issue under entirely distinct legal circumstances. There, the issue before the court was whether § 546(e) preempted state-law fraudulent transfer claims brought by the creditors of a bankrupt company.[28] The Second Circuit, in ruling on the preemption issue, never specifically addressed the pertinent question here: whether the safe harbor protects transfers that are simply conducted through Protected Entities acting as conduits where neither the debtor nor the transferee were Protected Entities.

---

[24] *Id.* at 99.

[25] *Id.* at 100.

[26] *Id.*

[27] *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) [hereinafter *Tribune*].

[28] *Id.* at 105.

The factual circumstances of *Tribune* are also far from clear, making it difficult to determine whether the meaning of the words "by or to" as used in § 546(e) was dispositive to the Second Circuit's holding. As an initial matter, the defendants in *Tribune* stood in different factual circumstances to each other and to Defendant here. For example, some of the defendant-recipients of the alleged fraudulent transfers in *Tribune* certainly appear to be Protected Entities.[29] If § 546(e) does generally preempt state-law claims and the defendants in *Tribune* are Protected Entities, then under the Seventh Circuit's interpretation of § 546(e), the safe harbor would apply because the transferees themselves are Protected Entities.

Moreover, it is not apparent from the Second Circuit's ruling whether the "intermediaries" effectuating the transfers were mere conduits or, rather, the initial transferees of the funds (such that the ultimate recipients—*i.e.*, the shareholders—were actually subsequent transferees).[30] Based upon these facts, it is not evident whether the particular interpretation of § 546(e) adopted by the Second Circuit was outcome determinative or simply dicta.

---

[29] For example, a group of defendants in *Tribune* are identified as "Financial Institution Holders." Other defendants in *Tribune* that appear to be Protected Entities enumerated in § 546(e) include Merrill Lynch, Pierce, Fenner Smith, Inc., Taft Harltey Funds, Morgan Stanley & Co. Inc., Morgan Stanly Capital Services, Inc., Citigroup Global Markets, Inc., CA Public Employee Retirement System, among many others.

[30] If the "intermediaries" in *Tribune* were transferees as opposed to mere conduits—a factual issue not considered by the *Tribune* court—then the transfers would likely fall within the safe harbor even under the Seventh Circuit's interpretation of the statute.

Furthermore, like every other circuit court that has addressed this issue, the Second Circuit failed to perform the proper analysis necessary to divine congressional intent. The Second Circuit recognized that the "search for legislative purpose is heavily informed by language, and analyzing all the language of a provision *and its relationship to the Code as a whole* is preferable to using literalness here and perceived legislative purpose (without regard to language) there as needed to reach particular results."[31] But then, inexplicably, immediately disregarded this fundamental cannon of statutory construction based upon its own perception of congressional intent.[32] It was only by substituting its own perception of congressional intent, without any attempt to place the relevant language within its statutory context, that the court arrived at its erroneous conclusion that Congress intended § 546(e) to "protect[] transactions rather than firms."[33]

---

[31] *Id.* at 120 (emphasis added) (citing *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.").

[32] *Id.* ("We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose.").

[33] *Id.* at 121. Of course, if Congress intended to protect all transactions—*e.g.*, "settlement payments" and transfers "in connection with a securities contract"—it was unnecessary for Congress to include the long list of enumerated entities in the statute. Under the Second Circuit's flawed interpretation of the statute, the list of Protected Entities is entirely superfluous.

In short, none of the cases discussed above performed the analysis necessary to properly interpret the statutory language of § 546(e). The few conclusory remarks made by, in particular, the Third, Sixth, and Eighth Circuits, on the meaning of the words "by or to" in § 546(e) do not evidence a "deep divide" on the statutory-interpretation question presented here. And the Second Circuit's conclusions in *Tribune* may have been dicta. Accordingly, the circuit courts should be given the opportunity to consider and, where appropriate, re-visit *en banc* the meaning of the phrase "by or to" in light of the Seventh Circuit's detailed opinion below. Only then can the Court determine whether the circuits are truly divided on this issue.

B. Petitioner Misstates the Seventh Circuit's Opinion.

Merit's arguments in support of its petition rely upon plain misstatements of the Seventh Circuit's opinion and analysis. Merit first argues that the Seventh Circuit erred by disregarding the plain language of the statute. (Pet. 15). The Seventh Circuit, however, expressly examined the plain language of § 546(e). (*See* Pet. App. 5–6). Indeed, only by doing so could the Seventh Circuit have reached the conclusion that the plain language of the statute was subject to multiple plausible interpretations. (*Id.*). The Seventh Circuit then, in accordance with well-established principles of statutory construction, examined the context and purpose of the statute to choose between the multiple plausible interpretations. (*See generally id.* at 7–18).

Merit's second argument—that the Seventh Circuit mistakes breadth for ambiguity—fairs no better. (Pet. 16). On the contrary, the Seventh Circuit expressly recognized the breadth of the safe harbor codified in section 546(e), but held that "that does not mean that there are no limits." (Pet. App. 15). Furthermore, in articulating this argument, Merit accuses the Seventh Circuit of interpreting a disjunctive "or" as a conjunctive "and." Specifically, Merit argues that the Seventh Circuit erroneously interpreted the language "by or to (*or* for the benefit of)" to mean "by or to (*and* for the benefit of)." (Pet. 16 n.6). This is also a misstatement of the Seventh Circuit's opinion and ignores the detailed analysis the Seventh Circuit undertook to interpret the meaning of the phrase. Merit's misunderstanding of the Seventh Circuit's opinion is based upon its own interpretation of the phrase "for the benefit of" to mean "beneficial interest in." (*See* Pet. App. 17). The Seventh Circuit considered and specifically rejected this interpretation. (*Id.*). And for good reason. Among other reasons cited by the Seventh Circuit, Merit's interpretation leads to the unavoidable, and absurd, conclusion that prior to the addition of the phrase "(or for the benefit of)" in § 546(e), the safe harbor applied *only* in circumstances where a Protected Entity acted as a conduit, but not where it actually received the value of the transfer or could otherwise be subject to fraudulent transfer liability. Such an interpretation cannot be squared with any of the legislative history or jurisprudence on the meaning and application of § 546(e).

Merit's final misstatement of the Seventh Circuit opinion highlights the rigor the court used to reach its

conclusion and Merit's misunderstanding of the legal framework courts are required to use to interpret statutory language.[34] Far from substituting its understanding of Congress's goals for the language Congress used in § 546(e), the Seventh Circuit engaged in an in-depth review of the statutory text to interpret it as a symmetrical and coherent regulatory scheme. The Seventh Circuit, among other things, considered the statutory language Congress used in §§ 544, 547, 548, 550, and 555 of the Bankruptcy Code, among others, to inform its conclusion as to meaning of the words Congress used in § 546(e). (*See generally* Pet. App. 1–18).

The Seventh Circuit's analysis of the other provisions of chapter 5—including other defenses granted to Protected Entities (*e.g.*, § 548(d)(2)) and the Bankruptcy Code's other safe harbors (*e.g.*, § 548(a)(2))—stands in stark contrast to the "analyses" performed by the other circuit courts. It is precisely because the Seventh Circuit is the only court to evaluate § 546 in the context of chapter 5 as a whole that it would be premature for the Court to review this issue.

C. The Court Should Not "Hold" Merit's Petition

Merit's request that this Court "hold" its petition if it grants the petition in *Tribune* because the disposition of the *Tribune* case *may* control in this case should be rejected. This Court's "hold" policy is based

---

[34] *See, e.g.*, *Davis*, 489 U.S. at 809.

upon the concept "that like cases must be treated alike."[35] This case, however, is nothing "like" the *Tribune* case. As discussed above, the meaning of the statutory phrase "by or to (or for the benefit of)" found in § 546(e) may not control the outcome of the *Tribune* case. To be sure, the facts of *Tribune* are so dissimilar to the facts of this case that it is entirely plausible that the outcome of *Tribune* would not apply here. Furthermore, if the Court were to grant the *Tribune* petition, the Court could conceivably resolve the preemption issue presented there without ever reaching the question presented here. As such, and for the reasons stated above, the court should deny Merit's petition and send the case back to the District Court regardless of whether it grants or denies the petition in *Tribune*.

---

[35] *Straight v. Wainwright*, 476 U.S. 1132, 1135, 106 S. Ct. 2004, 2006, 90 L. Ed. 2d 683 (1986).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

BARBARA WHITEN BALLIETTE
Counsel of Record
WILLIAM T. REID, IV
GREGORY S. SCHWEGMANN
JOSHUA J. BRUCKERHOFF
1301 S. Cap. of Texas Hwy
Suite C300
Austin, Texas 78750
(512) 647-6100
bballiette@rctlegal.com

Counsel for Respondent FTI Consulting Inc.

January 2017

APPENDIX

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [1] (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)

(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

RECORD AND BRIEFS,

No. 16-784

FILED
FEB 3 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THE CIRCUIT SPLIT IS ENTRENCHED AND REQUIRES NO FURTHER PERCOLATION 2

II. THE COURT SHOULD NOT PERMIT INCONSISTENT OUTCOMES IN THIS CASE AND *TRIBUNE* 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329 (2d Cir. 2011) 3

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 3

In re Plassein Int'l Corp., 590 F.3d 252 (3d Cir. 2009) 3, 4

In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013) 3

In re Resorts Int'l, Inc., 181 F.3d 505 (3d Cir. 1999) 3, 4

Straight v. Wainwright, 476 U.S. 1132 (1986) 5

In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317) 1, 4, 5, 6

STATUTES

11 U.S.C. § 546(e) 1, 3, 4

OTHER AUTHORITIES

Pet. for Reh'g, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 13-3992 (2d Cir. Apr. 12, 2016) 4

Reply Br., *Deutsche Bank Trust Co. Americas v. Robert R. McCormick Found.*, No. 16-317 (Nov. 4, 2016) 1

REPLY BRIEF FOR PETITIONER

Respondent does not deny that the breadth of Section 546(e) of the Bankruptcy Code is an important and recurring issue. Nor does Respondent suggest any reason why this case would not be an appropriate vehicle for the resolution of that question.

Respondent also does not truly dispute that there is a significant disagreement among the courts of appeals as to the proper interpretation of the Section 546(e) safe harbor. The Seventh Circuit, after all, acknowledged that its decision in this case deepened a longstanding circuit split (Pet. App. 16-17). And the petitioners in the *Tribune* case, who are situated similarly to Respondent in this case, agree. They argue in their reply brief that "the circuit split is entrenched and merits this Court's review." Reply Br. at 2 n.1, *Deutsche Bank Trust Co. Americas v. Robert R. McCormick Found.*, No. 16-317 (Nov. 4, 2016).

Respondent nevertheless claims that the five courts of appeals with which it disagrees "failed to perform the proper analysis necessary to divine congressional intent" (Br. in Opp. 13). But one party or the other could have made the same argument in any of the cases in which this Court granted certiorari to resolve disagreements about the interpretation of the Bankruptcy Code or other federal statutes. A circuit split is no less substantial because some courts conclude that the meaning of a statute is obvious from its

plain language, while others find it appropriate to engage in lengthy explorations of secondary indicators of meaning.

Regardless of *why* the courts of appeals are divided on the scope of the safe harbor, there is no dispute that the courts of appeals, and lower courts bound by their precedents, are disposing of disputes involving millions or billions of dollars in an inconsistent manner. This Court's intervention is necessary and appropriate to harmonize the law.

I. THE CIRCUIT SPLIT IS ENTRENCHED AND REQUIRES NO FURTHER PERCOLATION.

Respondent does not seriously contend that this lawsuit could have survived summary judgment in many courts across the United States. Indeed, Respondent acknowledged in response to Petitioner's motion for a change of venue to Delaware that the safe harbor would effectively end the litigation in that forum. The Seventh Circuit also understood that "we are taking a different position from the one adopted by five of our sister circuits" (Pet. App. 16).

Respondent's principal argument against this Court's review is that the courts of appeals in those other circuits should be given an opportunity to consider the Seventh Circuit's analysis and overturn their precedents in en banc proceedings. There is no reason to believe that such an outcome will ever occur. Nor would it be appropriate for this Court to forgo an

opportunity to resolve the question now, which would require others to litigate the issue for years into the future. Respondent's suggested approach is not likely to solve anything. It is instead a recipe for endless delay and the inefficient use of judicial resources.

The courts of appeals have staked out their positions on the scope of Section 546(e) over a period of more than twenty years. The Eleventh Circuit majority in *Munford* opined that the involvement of a financial institution is irrelevant unless the institution has a beneficial interest in the transaction. *See In re Munford, Inc.*, 98 F.3d 604, 610, 614 (11th Cir. 1996).[1] The Second and Third Circuits, which are home to a large percentage of U.S. corporate bankruptcy filings, have declined prior opportunities to reconsider or distinguish their precedents on the breadth of the safe harbor. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013) (adhering to and clarifying *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011)); *In re Plassein Int'l Corp.*, 590 F.3d 252, 259 (3d Cir. 2009) (adhering to *In re Resorts Int'l, Inc.*, 181 F.3d 505 (3d Cir. 1999)). Indeed, the plain-language interpretation of the safe harbor is so firmly established in the Second Circuit that the *Tribune* plaintiffs chose to devote their recent petition for rehearing en banc to other issues. *See* Pet. for Reh'g, *In*

---

[1] Respondent cryptically suggests that the *Munford* court's concept of a "beneficial interest" and the language "for the benefit of" in the statute are somehow not congruent (Br. in Opp. 15). If a transfer in which a financial institution has a beneficial interest is not for the benefit of that institution, or vice versa, Respondent does not explain why that is so.

re Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d Cir. Apr. 12, 2016).

Respondent's approach to this case also is telling. It could have brought suit against all of Bedford Downs' former shareholders in the Delaware court where Valley View's bankruptcy case was filed. *Resorts International* and *Plassein* would have presented obstacles, but the Third Circuit might have overruled them if presented with Respondent's arguments in an en banc proceeding. Instead of embracing the approach that it now suggests would be fruitful, Respondent elected to sue Petitioner in Illinois, where it believed the law was unsettled. Respondent also chose to abandon any possible recovery against other former shareholders that were subject to jurisdiction only in the Second and Third Circuits.

In short, the circuit split on the scope of the safe harbor is real, substantial, and unlikely to be resolved by the courts of appeals. This Court should grant review in this case so that debtors, trustees, and creditors may organize their affairs and their litigation efforts around a uniform interpretation of the law.

II. THE COURT SHOULD NOT PERMIT INCONSISTENT OUTCOMES IN THIS CASE AND *TRIBUNE*.

Both this case and *Tribune* present the question of the scope of the Section 546(e) safe harbor. The parties agree that if the Court grants the petition in *Tribune*,

the Court's decision in that case might, but would not necessarily, control in this one.

Respondent cites Justice Brennan's opinion in *Straight* for the principle that like cases should be treated alike (Br. in Opp. 17). Petitioner agrees, but Respondent's suggested application of that principle does not make sense: "deny Merit's petition and send the case back to the District Court regardless of whether it grants or denies the petition in *Tribune*" (Br. in Opp. 17). Justice Brennan also stated that a "hold" is appropriate when "the disposition of the granted case may have an effect on the merits of the case which is to be held." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting from denial of stay). That description fits this case.[2]

To avoid the possibility of inconsistent results, if the Court grants review in *Tribune* but not in this case, the Court should hold this petition pending the disposition of the *Tribune* case.

---

[2] By contrast, Justice Powell explained that a stay was not appropriate in *Straight* because Straight's case would not be affected by any possible decision in a pending case. *See id.* at 1133 n.2 (Powell, J., concurring in denial of stay). That is not true here.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, if the Court grants the petition for certiorari in the *Tribune* case, it should hold this petition.

Respectfully submitted,

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

February 2017

RECORD AND BRIEFS

No. 16-784

FILED
JUL 13 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

BRIAN C. WALSH*
JOHN J. SCHOEMEHL
LAURA UBERTI HUGHES
BRYAN CAVE LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601

Counsel for Petitioner

**Counsel of Record*

PAUL D. CLEMENT*
H. CHRISTOPHER BARTOLOMUCCI
GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

WILLIAM T. REID, IV
GREGORY S. SCHWEGMANN
JOSHUA J. BRUCKERHOFF
REID COLLINS & TSAI LLP
1301 S. Capital of
Texas Highway,
Building C, Suite 300
Austin, TX 78746

Counsel for Respondent

Petition For Certiorari Filed December 16, 2016
Certiorari Granted May 1, 2017

TABLE OF CONTENTS

Page

Relevant Docket Entries, FTI Consulting, Inc. v. Merit Management Group, LP, No. 1:11-cv-07670 (N.D. Ill.) 1

Relevant Docket Entries, FTI Consulting, Inc. v. Merit Management Group, LP, No. 15-3388 (7th Cir.) 5

Complaint, Dkt. No. 1 (Oct. 27, 2011) 7

Excerpts from Exhibits to Declaration of Joseph Canfora, submitted in support of Defendant's Motion for Judgment on the Pleadings, Dkt. No. 60 (Nov. 5, 2014):

Joint Written Instructions Authorizing Section 1.07 Disbursements (Oct. 30, 2007) 23

Joint Escrow Instructions (Oct. 25, 2007) 26

Closing Statement (BDMC Shares) (Oct. 30, 2007) 30

Acknowledgment and Receipt (Oct. 2007) 30

Stock Power (Aug. 31, 2007) 31

Stock Power (Aug. 31, 2007) 32

Stock Power (Aug. 31, 2007) 33

Stock Power (Aug. 31, 2007) 34

Stock Power (Aug. 31, 2007) 35

TABLE OF CONTENTS – Continued

Page

Consent by Shareholders and Directors of Bedford Downs Management Company (Aug. 15, 2007) 36

Escrow Agreement (Sept. 4, 2007) 40

Notice of Distribution by Shareholders' Representative (Oct. 2007) 64

Memorandum from Carmen W. Shick to Merit Management Group, LP (Nov. 9, 2010) 65

Excerpts from Amended Exhibit 1 to Declaration of Joseph Canfora, Dkt. No. 61 (Nov. 6, 2014):

Settlement Agreement (Aug. 14, 2007) 69

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

District Court Memorandum Opinion (Oct. 2, 2015) ..... App. 19

Court of Appeals Opinion (July 28, 2016) ..... App. 1

Order Denying Rehearing (Aug. 30, 2016) ..... App. 40

RELEVANT DOCKET ENTRIES

United States District Court
Northern District of Illinois

Date Filed	#	Docket Text
10/27/2011	1	COMPLAINT filed by FTI Consulting, Inc.; Filing fee $ 350, receipt number 0752-6516027.(Rosenthal, Jason) (Entered: 10/27/2011)
12/07/2011	16	MOTION by Defendant Merit Management Group, LP to dismiss *Complaint* (Swatzell, Jeffrey) (Entered: 12/07/2011)
12/09/2011	19	MOTION by Plaintiff FTI Consulting, Inc. to transfer case *to the Bankruptcy Court Pursuant to Local Rule 40.3.1* (Rosenthal, Jason) (Entered: 12/09/2011)
07/24/2012	28	MINUTE entry before Honorable Joan B. Gottschall: Plaintiff FTI Consulting, Inc.'s motion to transfer case to the bankruptcy court 19 is granted; the case is referred to the United States Bankruptcy Court for the Northern District of Illinois for proposed findings of fact and conclusions of law. [For further detail see separate order(s).] Mailed notice (lp,) (Entered: 07/25/2012)
07/24/2012	29	ORDER Signed by the Honorable Joan B. Gottschall on 7/24/2012: (lp,) (Entered: 07/25/2012)

09/05/2012	32	MOTION by Defendant Merit Management Group, LP to transfer venue (Exhibits). (et,) (Entered: 09/10/2012)
08/05/2014	44	ORDER: Enter Memorandum Opinion & Order. Defendant's motion to dismiss 16 is denied. Defendant's motion to transfer venue 32 is denied. The reference to the bankruptcy court is withdrawn. A status hearing is set for September 5, 2014, at 9:30 a.m. Signed by the Honorable Joan B. Gottschall on 8/5/2014. Mailed notice (ef,) (Entered: 08/05/2014)
08/05/2014	45	MEMORANDUM Opinion and Order Signed by the Honorable Joan B. Gottschall on 8/5/2014. Mailed notice(ef,) (Entered: 08/05/2014)
09/12/2014	52	*Defendant's* ANSWER to Complaint *and Affirmative Defenses* by Merit Management Group, LP(DeJonker, Jason) (Entered: 09/12/2014)
11/05/2014	58	MOTION by Defendant Merit Management Group, LP for judgment on the pleadings (DeJonker, Jason) (Entered: 11/05/2014)
11/05/2014	60	MEMORANDUM by Merit Management Group, LP in support of motion for judgment on the pleadings 58 (Attachments: # 1 Declaration, # 2 Exhibit 1 part 1 of 6, # 3 Exhibit 1 part 2 of 6, # 4 Exhibit 1 part 3 of

		6, # 5 Exhibit 1 part 4 of 6, # 6 Exhibit 1 part 5 of 6, # 7 Exhibit 1 part 6 of 6, # 8 Exhibit 2, # 9 Exhibit 3, # 10 Exhibit 4, # 11 Exhibit 5, # 12 Exhibit 6) (DeJonker, Jason) (Entered: 11/05/2014)
11/06/2014	61	EXHIBIT by Defendant Merit Management Group, LP – *Amended Exhibit 1 to Declaration of Joseph Canfora* regarding memorandum in support of motion, 60 (DeJonker, Jason) (Entered: 11/06/2014)
12/09/2014	65	MEMORANDUM by FTI Consulting, Inc. in Opposition to motion for judgment on the pleadings 58 (Schwegmann, Gregory) (Entered: 12/09/2014)
12/23/2014	66	REPLY by Defendant Merit Management Group, LP to motion for judgment on the pleadings 58, memorandum in opposition to motion 65 (Harney, Christopher) (Entered: 12/23/2014)
10/02/2015	89	MINUTE entry before the Honorable Joan B. Gottschall: Enter Memorandum Opinion and Order. Merit's motion for judgment on the pleadings 58 is granted. The clerk is directed to enter final judgment accordingly. Civil case terminated. Mailed notice (mjc,) (Entered: 10/02/2015)
10/02/2015	90	MEMORANDUM Opinion and Order Signed by the Honorable Joan

		B. Gottschall on 10/2/2015. Mailed notice(mjc,) (Entered: 10/02/2015)
10/02/2015	91	ENTERED JUDGMENT. (mjc,) (Entered: 10/02/2015)
10/02/2015	92	(CORRECTED) ENTERED JUDGMENT in favor of the defendant. (mjc,) (Entered: 10/05/2015)
10/27/2015	93	NOTICE of appeal by FTI Consulting, Inc. regarding orders 92 Filing fee $ 505, receipt number 0752-11230217. (Schwegmann, Gregory) (Entered: 10/27/2015)

RELEVANT DOCKET ENTRIES

Seventh Circuit Court of Appeals

Date Filed	#	Docket Text
10/27/2015	1	Private civil case docketed. Fee paid. Docketing Statement due for Appellant FTI Consulting, Inc. by 11/03/2015. Transcript information sheet due by 11/10/2015. Appellant's brief due on or before 12/07/2015 for FTI Consulting, Inc. [1] [6703482] [15-3388] (CR)
03/30/2016	20	Case heard and taken under advisement by panel: Diane P. Wood, Chief Judge; Richard A. Posner, Circuit Judge and Ilana Diamond Rovner, Circuit Judge. [20] [6739443] [15-3388] (RT)
07/28/2016	23	Filed opinion of the court by Chief Judge Wood. REVERSED and REMANDED. Diane P. Wood, Chief Judge; Richard A. Posner, Circuit Judge and Ilana Diamond Rovner, Circuit Judge. [23] [6771180] [153388] (CAG)
07/28/2016	24	ORDER: Final judgment filed per opinion. With costs: yes. [24] [6771185] [15-3388] (CAG)
08/11/2016	28	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Merit Management Group, LP. Paper copies due on 08/15/2016 [28] [6774667] [15-3388] (RT)

08/30/2016	32	ORDER: Appellee Merit Management Group, LP Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [32] [6779130] [15-3388] (CR)
09/07/2016	33	Mandate issued. No record to be returned. [33] [6780463] [15-3388] (CAG)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust, Plaintiff, v. MERIT MANAGEMENT GROUP, LP, Defendant.	)	Case No.

COMPLAINT

(Filed Oct. 27, 2011)

Plaintiff FTI Consulting, Inc., in its capacity as Trustee of the Centaur, LLC Litigation Trust, brings this action against Defendant Merit Management Group, LP ("Defendant" or "Merit Management") for the avoidance and recovery of a fraudulent transfer, and respectfully states as follows:

I. NATURE OF THE ACTION

1. On October 30, 2007, Valley View Downs, LP ("Valley View Downs") purchased Bedford Downs Management Corporation ("Bedford Downs") by transferring $55 million to its owners, including $16,503,850 to Merit Management for its 30.007% ownership interest in the company.

2. At the time of the transfer, Bedford Downs had no revenue or assets of any worth. Bedford Downs' only "asset" of any conceivable value was its application to win the last harness racing license available in the State of Pennsylvania – a license that Valley View Downs was also pursuing. Valley View Downs essentially paid the owners of Bedford Downs $55 million to bow out of the competition.

3. The price Valley View Downs paid, however, was objectively unreasonable because, among other things, the parties grossly overvalued both the harness racing license and Bedford Downs' application to win the license.

4. Valley View Downs received far less than reasonably equivalent value for the $55 million it paid for Bedford Downs and was insolvent at the time of the transaction. As such, at closing, Valley View Downs fraudulently transferred $55 million to the owners of Bedford Downs, to the detriment of Valley View Downs' creditors.

5. As part of the transaction, Valley View Downs fraudulently transferred $16,503,850 to Merit Management in its capacity as a 30.007% owner of Bedford Downs. The Trustee of the Centaur, LLC Litigation Trust, as assignee of the claims and causes of action pleaded herein, seeks to avoid this transfer as fraudulent pursuant to applicable state and federal law.

II. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action, which arises under, arises in, and relates to a case under Title 11, pursuant to 28 U.S.C. § 1334. Venue lies in this district pursuant to 28 U.S.C. § 1409.

7. This Court also has subject matter jurisdiction pursuant to (i) 28 U.S.C. § 1331 because this action arises under laws of the United States, 11 U.S.C. §§ 548 and 544; and (ii) 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and there is complete diversity of citizenship between Plaintiff and Defendant.

8. This is a core proceeding.

III. PARTIES AND OTHER RELEVANT PERSONS AND ENTITIES

A. PLAINTIFF

9. Plaintiff FTI Consulting, Inc. is the duly authorized and appointed trustee to the Centaur, LLC Litigation Trust (the "Trust"), which, as explained below, was formed pursuant to the confirmed plan of reorganization (the "Confirmed Plan") in In re Centaur, LLC et al., jointly administered under the Case No. 10-10799 in the United States Bankruptcy Court for the District of Delaware (the "Centaur Bankruptcy Case").

10. Pursuant to the Confirmed Plan and the Centaur, LLC Litigation Trust Agreement, the debtors in the Centaur Bankruptcy Case, including Valley

View Downs, transferred to the Trust all of their rights and interests in the "Designated Avoidance Actions," which, as defined in the Confirmed Plan, include the claims and causes of action asserted herein.

B. DEFENDANT

11. Merit Management Group, LP is a limited partnership with its principal place of business located at 760 Village Center Drive, Suite 200, Burr Ridge, Illinois, 60527. Merit Management was a 30.007% owner of Bedford Downs, and as such, received a $16,503,850 fraudulent transfer from Valley View Downs on October 30, 2007, in connection with Valley View Downs' purchase of Bedford Downs.

C. THE CENTAUR DEBTORS

12. On October 28, 2009, Valley View Downs and Centaur PA Land, LP, Pennsylvania limited partnerships, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Valley View Downs and Centaur PA Land, LP are wholly owned subsidiaries of Centaur, LLC ("Centaur LLC").

13. On March 6, 2010, Centaur LLC and twelve of its wholly owned subsidiaries also filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The bankruptcy cases of these debtors, along with the bankruptcy cases of Valley

View Downs and Centaur PA Land, are jointly administered before the Honorable Kevin J. Carey under Case No. 10-10799.

14. Centaur LLC and its subsidiaries are domestic horse racing, off-track betting, and casino operators. At the time of their bankruptcy petitions, Centaur LLC and its subsidiaries owned, operated, and had interests in racing and casino facilities in Indiana and Colorado, and also had a project in-progress in northwest Pennsylvania.

15. At the time that it filed for bankruptcy, Valley View Downs owned a harness racing license and intended to develop a race track with a casino – commonly referred to as a "racino" – to be known as "Valley View Downs," in Lawrence County, Pennsylvania, 55 miles northwest of Pittsburgh. Valley View Downs filed for bankruptcy after failing to secure a required gaming license in the time allotted under the terms of various loan agreements.

IV. FACTUAL BACKGROUND

A. VALLEY VIEW DOWNS AND BEDFORD DOWNS COMPETE FOR PENNSYLVANIA'S LAST HARNESS RACING LICENSE

16. Pennsylvania State Harness Racing Commission (the "Commission") for the State's last available harness racing license [sic]. Shortly thereafter, in early 2003, Bedford Downs submitted an application to the Commission for the same license.

17. The policy of the Commission was to treat applicants as a comparative group, which effectively required the applicants to compete against each other for the only license available. Both applicants submitted detailed proposals to the Commission to construct and operate a so-called, "racino" – a racing facility that had slot machines on the premises.

18. The Commission, however, only had the power to issue harness racing licenses. Therefore, whichever applicant won the harness racing license had to take the further step of applying for and winning a Category 1 Slot License ("Gaming License") from a different administrative body – the Pennsylvania Gaming Control Board (the "Gaming Board") – before it could build its proposed racino.

19. The viability of Valley View Downs' proposal depended upon it obtaining a Gaming License because the majority of its projected revenue derived from the operation of slot machines. Without the Gaming License, the Valley View Downs project was not economically viable.

20. Under the Pennsylvania Gaming Act, holding a harness racing license satisfies a condition precedent to receiving a Gaming License, but it does not guarantee that the holder will receive one. Therefore, winning the harness racing license only represented one step in the path toward building a racino. The winner would still have to jump through several more administrative hoops and risk substantial additional

time and money with no guarantee that its racino would ever become a reality.

B. THE COMMISSION REJECTS BOTH APPLICATIONS

21. On November 5, 2005, the Commission unanimously rejected both Valley View Downs' and Bedford Downs' applications because it had concerns with both of their proposals.

22. The Commission rejected Valley View Downs' application because of certain concerns that it had with Valley View Downs' proposed site and facility design.

23. The Commission rejected Bedford Downs' application because, among other things, it lacked confidence in Bedford Downs' proposed financing.

24. Both parties appealed the Commission's decision and the matter eventually made its way to the Supreme Court of Pennsylvania (the "Supreme Court").

25. On July 2, 2007, the Supreme Court upheld the Commission's denial of both applications but expressly provided both applicants with the opportunity to cure any deficiencies in their original applications and re-apply.

26. The Commission, however, still had no obligation to award the license to either applicant. Pursuant to a Statement of Policy issued by the Commission

in 2003, the Commission was not obligated to issue any license despite the fact that a license was available.

C. VALLEY VIEW DOWNS BUYS OUT BEDFORD DOWNS

27. After the Supreme Court issued its opinion, Valley View Downs decided that it could increase its chances of winning the license by buying out the competition while at the same time addressing some of the deficiencies the Commission found in its original application.

28. To this end, Valley View Downs approached the principals of Bedford Downs and proposed a buy-out. As a result of the brief negotiation that followed, Bedford Downs and Valley View Downs entered into an agreement whereby Bedford Downs agreed to withdraw its application, and, if Valley View Downs was awarded the license, it would buy Bedford Downs for $55 million. In addition, Valley View Downs agreed to purchase the property that Bedford Downs had chosen for its racino for $20 million. According to the terms of the deal, Valley View Downs would continue with its application as the sole applicant and substitute the Bedford Downs property (the "Lawrence County Land") for the site that Valley View Downs had originally chosen.

29. The Commission eventually awarded Valley View Downs a license to build a racetrack on the Lawrence County Land. Valley View Downs then closed the deal to purchase Bedford Downs on October 30, 2007,

by transferring $55 million dollars to its owners, including $16,503,850 to Merit Management.

30. Valley View Downs' fatigue with the application process and its apparent over-eagerness to win the harness racing license resulted in it making an objectively unsound business decision.

31. Even assuming that Valley View Downs would eventually be awarded the Gaming License it needed to open its proposed racino – a license it never managed to obtain – the project was not a sound investment with the inclusion of the additional $55 million debt Valley View incurred as a result of its purchase of Bedford Downs.

32. More importantly, this deal resulted in Valley View Downs fraudulently transferring $55 million dollars to the owners of Bedford Downs to the detriment of all of Valley View Downs' present and future creditors because (i) Valley View Downs was insolvent at the time of the transfer; and (ii) Valley View Downs significantly overpaid for Bedford Downs and, as such, did not receive anywhere near fair consideration or reasonably equivalent value in the transaction.

D. BEDFORD DOWNS WAS WORTH SIGNIFICANTLY LESS THAN $55 MILLION AT THE TIME OF THE TRANSFER

33. Bedford Downs had no streams of revenue and its assets were limited to the following: state trademarks and logos, corporate books and records,

architectural renderings, market studies, professional services related to licensing, and a website. As its assets were of limited, if any, value on the date of the transfer, any objective valuation of Bedford Downs would have put its net worth at a number far below $55 million by October 30, 2007.

34. Valley View Downs essentially paid $55 million dollars for a valueless company. The sole purpose of the transaction was to remove Bedford Downs from the competition for a license that only represented a single step in the long and risky process of opening and operating a racino in Pennsylvania.

35. Under any legitimate valuation methodology, the $55 million dollar price tag for Bedford Downs was objectively unreasonable at the time Valley View Downs purchased it. As such, the $16,503,850 Valley View Downs transferred to Merit Management for its 30.007% ownership interest in Bedford Downs was likewise objectively unreasonable.

E. VALLEY VIEW DOWNS FAILS TO OBTAIN THE GAMING LICENSE

36. On or around October 29, 2007 Valley View Downs submitted its application for the Gaming License to the Gaming Board. The Gaming Board was under no obligation to issue any applicant a license despite the fact that one was available. In connection with the application process, Valley View Downs had to submit to an investigation by the Gaming Board, which Valley View Downs should have understood

could take up to year or more from the date of the application.

37. More than six months after it submitted its application, Valley View Downs still had not been granted the Gaming License. Accordingly, the complex financing package that Valley View Downs had obtained for the racino project was about to expire. Facing the prospect of losing its funding for the project, Valley View Downs requested that the Gaming Board grant it a conditional Gaming License.

38. On or around July 10, 2008, the Gaming Board unanimously denied Valley View Downs' request for a conditional Gaming License, stating that it needed additional time to complete its investigation. Valley View Downs never received the Gaming License and filed for bankruptcy on October 28, 2009.

39. In sum, at the time of Valley View Downs' $55 million transfer to the owners of Bedford Downs, there was absolutely no guarantee that Valley View Downs would be awarded the Gaming License it needed to open its racino. Even if Valley View Downs had received the Gaming License, the project was no longer economically viable due to the massive additional debt it took on to buy out Bedford Downs in its bid to win the harness racing license.

F. VALLEY VIEW DOWNS FILES FOR BANKRUPTCY

40. On October 28, 2009, Valley View Downs filed a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware.

41. As part of the bankruptcy proceeding, Valley View Downs' rights to the harness racing license, together with the Lawrence County Land, were sold to the highest bidder, American Harness, for $5.6 million – a small fraction of the $55 million Valley View Downs paid just to eliminate Bedford Downs as a competitor for the license.

42. Because Valley View Downs did not receive reasonably equivalent value in exchange for its $55 million transfer to the owners of Bedford Downs and was insolvent at the time of the transfer, the Trust seeks to avoid the $16,503,850 transfer to Merit Management for its 30.007% ownership interest in Bedford Downs as a fraudulent transfer under both the Bankruptcy Code and applicable state fraudulent transfer law.

V. CAUSES OF ACTION

COUNT ONE: AVOIDANCE OF FRAUDULENT TRANSFER (11 U.S.C. §548(A)(1)(B))

43. Plaintiff repeats and re-alleges the allegations set forth in all preceding paragraphs of this Complaint, as if set forth in full here.

44. Valley View Downs transferred $16,503,850 to Merit Management on October 30, 2007, in exchange for its 30.007% ownership interest in Bedford Downs (the "Fraudulent Transfer").

45. The $16,503,850 that Valley View Downs transferred was property in which Valley View Downs had an interest.

46. At the time of the Fraudulent Transfer, Bedford Downs had little to no net worth, and in any event, was worth significantly less than $55 million dollars. The conclusions drawn by both Valley View Downs and Bedford Downs concerning the value of Bedford Downs at the time of the transfer were objectively unreasonable.

47. The parties also vastly overvalued the harness racing license. Receipt of the harness racing license was merely one step in the path to building a racino and it provided no guarantee that Valley View Downs would be able to complete the project. Valley View Downs' ability to build the racino was contingent upon numerous factors, most notably, its receipt of the Gaming License. Because Valley View Downs' ability to build the racino was uncertain and contingent upon factors outside of its control, it was objectively unreasonable for Valley View Downs to pay $55 million to buy out the owners of Bedford Downs for the sole purpose of getting them out of the competition for the harness racing license.

48. For these and other reasons, Valley View Downs did not receive reasonably equivalent value for the Fraudulent Transfer.

49. Valley View Downs was insolvent at time of the Fraudulent Transfer because, among other things, its liabilities far exceeded its assets when the transfer was made.

50. Accordingly, the Fraudulent Transfer is avoidable under 11 U.S.C. § 548(a)(1)(B) and recoverable under 11 U.S.C. § 550.

51. As a result of the Fraudulent Transfer, Valley View Downs' creditors have been damaged in an amount to be determined at trial.

COUNT TWO: AVOIDANCE OF FRAUDULENT TRANSFER (11 U.S.C. § 544 & PENNSYLVANIA UNIFORM FRAUDULENT TRANSFER ACT § 5105)

52. Plaintiff repeats and re-alleges the allegations set forth in all preceding paragraphs of this Complaint as if fully set forth herein.

53. The Fraudulent Transfer is avoidable under Pennsylvania law by actual creditors holding allowable unsecured claims against Valley View Downs.

54. At the time of the Fraudulent Transfer, Valley View Downs had one or more creditors with claims totaling more than $55 million.

55. Accordingly, the Fraudulent Transfer is avoidable under 11 U.S.C. § 544(b) and § 5105 of the Pennsylvania Uniform Fraudulent Transfer Act.

56. The Trustee may recover the avoided transfer under 11 U.S.C. § 550 and § 5107 of the Pennsylvania Uniform Fraudulent Transfer Act for the benefit of the estate and its creditors.

57. As a result of the Fraudulent Transfer, Valley View's creditors have been damaged in an amount to be determined at trial.

VIII. REQUEST FOR RELIEF

THEREFORE, Plaintiff respectfully prays for judgment in Plaintiff's favor, and against the Defendant as follows:

a) Avoiding as fraudulent the $16,503,850 transfer to Defendant;

b) Awarding Plaintiff the recovery of the property transferred;

c) Awarding Plaintiff its reasonable attorneys' fees and costs incurred in the prosecution of this action to the extent allowed by law or equity; and

d) Awarding Plaintiff prejudgment and post judgment interest at the highest rates allowed by law or equity;

e) Granting Plaintiff such other and further relief, at law or equity, as the Court determines is just and appropriate.

Dated: October 27, 2010 [sic]

Respectfully submitted,

/s/ Jason M. Rosenthal
One of the Attorneys for the Trustee

William T. Reid IV* (breid@rctlegal.com)
Joshua J. Bruckerhoff* (jbruckerhoff@rctlegal.com)
Gregory S. Schwegmann*
(gschwegmann@rctlegal.com)
REID COLLINS & TSAI LLP
4301 Westbank Drive
Building B, Suite 230
Austin, Texas 78746
Tel.: 512-647-6100
Fax: 512-647-6129

AND

Jason M. Rosenthal (rosenthal@sw.com)
Marcus D. Fruchter (fruchter@sw.com)
SCHOPF & WEISS LLP
One South Wacker Drive, 28th Floor
Chicago, IL 60606
Tel.: 312-701-9300
Fax: 312-701-9335

(*Pro Hac Vice Applications To Be Filed.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust, Plaintiff, v. MERIT MANAGEMENT GROUP, LP, Defendant.	Case No. 1:11-cv-07670 The Honorable Judge Joan B. Gottschall

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

(Filed Nov. 5, 2014)

* * *

---

* * *

JOINT WRITTEN INSTRUCTIONS AUTHORIZING SECTION 1.07 DISBURSEMENTS

Citizens Bank of Pennsylvania
870 Westminister Street RWR 110
Providence, Rhode Island 02903
Attn: Jean A. Parrillo, Vice President
Facsimile: (401) 455-5279

Stewart Title Guaranty Company
151 N. Delaware, Suite 725
Indianapolis, Indiana 46204
Attn: Lisa L. Ingram, Commercial Escrow Officer
Fax: (317) 713-1950

October 30, 2007

Re: Escrow Agreement by and among Bedford Downs Management Corporation, a Pennsylvania corporation ("*BDMC*"), Valley View Downs, LP, a Permsylvania limited partnership ("*VVD*"), Carmen W. Shick, Kendra A Tabak and Kenneth R. Shick III (collectively, the "*Shicks*"), the individuals and entities who are shareholders of BDMC and who are signatories thereto (the "*Shareholders*") and Citizens Bank of Pennsylvania, a Pennsylvania corporation ("*Citizens Bank*"), dated as of September 4, 2007

Ladies and Gentlemen:

The purpose of this letter is to provide instructions to you with respect to the disbursement of certain funds and certain documents pursuant to the terms and conditions of the Escrow Agreement. Capitalized terms used herein and not otherwise defined shall have the meanings assigned to those terms in the Settlement Agreement.

The parties hereby direct Citizens Bank, in its capacity as Escrow Agent, to make the following disbursements:

1. to Carmen W. Shick, Kendra A. Tabak and Kenneth R. Shick III, $19,794,396.29, pursuant to the wire instructions attached hereto as *Exhibit A*;

2. to Centaur PA Land, LP, $0.00, pursuant to the wire instructions attached hereto as *Exhibit B*;

3. to Stewart Title Guaranty Company, $205,603.71, pursuant to the wire instructions attached hereto as *Exhibit C*; and

4. to Carmen Shick, as shareholders' representative, $47,500,000.00, pursuant to the wire instructions attached hereto as *Exhibit D.*

The remaining balance of $7,500,000.00 shall be retained by Citizens Bank, pursuant to and in accordance with the terms of the Escrow Agreement.

The parties hereby direct Stewart Title Guaranty Company, in its capacity as Escrow Agent, to make the following disbursements:

1. to VVD, the Escrow Documents and Releases.

The parties agree that this letter may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same agreement and that facsimile transmission of a counterpart hereto shall constitute an original hereof.

Sincerely,

VALLEY VIEW DOWNS, LP

By: /s/ Roderick J. Ratcliff
Roderick J. Ratcliff,
Chief Executive Officer

Carmen W. Shick,
Shareholders' Representative
and individually

* * *

* * *

October 25, 2007

Via Facsimile

Lisa L. Ingram
Commercial Escrow Officer
Stewart Title Guaranty Company
151 N. Delaware, Suite 725
Indianapolis, Indiana 46204
Fax: 317-713-1950

Jean A. Parrillo
Vice President
Citizens Bank of Pennsylvania
870 Westminster Street RWR 110
Providence, Rhode Island 02903
Fax: 401-455-5279

RE: Escrow Agreement, executed by and among Bedford Downs Management Corporation, a Pennsylvania corporation ("*BDMC*"), Valley View Downs, LP, an Pennsylvania limited partnership ("*VVD*"), Carmen W. Shick, Kendra A. Tabak and Kenneth

R. Shick III (collectively, the "*Shicks*"), the individuals and entities who are shareholders of BDMC and who are signatories thereto (the "*Shareholders*"), and Citizens Bank of Pennsylvania, an Pennsylvania banking corporation ("*Citizens Bank*"), as of September 4, 2007, a copy of which is attached hereto as *Exhibit A* (the "*Escrow Agreement*")

JOINT ESCROW INSTRUCTIONS

Ladies and Gentlemen:

As you know, the firm of Ice Miller LLP ("*IM*") represents VVD in connection with the Proposed Acquisition, and the firm of Meyer, Unkovic & Scott LLP ("*MUS*") represents BDMC, the Shicks and the Shareholders in connection with the Proposed Acquisition. This correspondence represents joint instructions ("*Instructions*") from IM and MUS to Citizens Bank and Stewart Title Guaranty Company ("*Stewart*"), to be carried out in connection with the closing of the Proposed Acquisition. Upon receipt and review of these Instructions, please indicate your acceptance of these Instructions by signing the acceptance and acknowledgement provided below and return executed copies of the same to TM and MUS via facsimile according to the numbers listed below. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Escrow Agreement.

I. *DEPOSITS.* Prior to the date hereof, and pursuant to the Escrow Agreement, BDMC, Shicks and/or Shareholders have deposited into escrow with Citizens

Bank Escrow Documents. Because Stewart is the insurer of VVD's title in connection with the Proposed Acquisition, the parties hereby appoint Stewart as the "Escrow Agent" with respect to the delivery of the Escrow Documents and the Releases, while Citizens Bank shall remain the "Escrow Agent" for all other purposes contemplated by the Escrow Agreement. In all respects relative to the duties of the Escrow Agent with respect to the Escrow Documents or Acquisition Documents (as defined herein), Stewart agrees to be bound by the terms of the Escrow Agreement.

II. *INSTRUCTION TO CITIZENS BANK.* IM and MUS hereby instruct and direct Citizens Bank to immediately deliver by overnight courier to Stewart, at the address provided above and to the attention of Lisa Ingram, all of the Escrow Documents and Releases currently in its possession (collectively, the "*Acquisition Deposits*"), which Stewart shall hold in escrow subject to and in accordance with the terms of these Instructions.

III. *RELEASE OF ACQUISITION DEPOSITS.* The parties hereto acknowledge and agree that Stewart shall [sic] responsible for the release or return of the Acquisition Deposits and Escrow Documents in accordance with *Section 3* of the Escrow Agreement and any subsequent Consummation Notice given thereunder, and Citizens Bank shall remain responsible for all other duties and obligations of the "Escrow Agent" set forth in the Escrow Agreement pursuant to *Section 3* of the Escrow Agreement or otherwise (including but

not limited to the duty and obligation to accept deposits and release funds pursuant to the Escrow Agreement) and any subsequent Consummation Notice given thereunder.

IV. *GENERAL PROVISIONS.*

A. Except as modified by these Instructions, the Escrow Agreement shall remain in full force and effect. If there is a conflict between the terms of these Instructions and the terms of the Escrow Agreement, the terms of these Instructions shall govern.

B. These Instructions may be executed in counterparts, which taken together shall constitute one and the same instrument.

C. Any amendment or supplement to these Instructions shall be in a writing signed by, or email sent by, the undersigned.

D. These Instructions shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.

E. No claim of default shall be valid if the party making same is itself in default, unless said default is caused by a failure of the other party to take some action required hereunder.

[SIGNATURES ON FOLLOWING PAGE]

* * *

---

* * *

CLOSING STATEMENT (BDMC SHARES)

Sellers:	Carmen W. Shick, as Shareholders' Representative for all of the Shareholders of Bedford Downs Management Corporation, a Pennsylvania corporation ("*BDMC*")
Buyer:	Valley View Downs, LP
Property:	All of the issued and outstanding shares of BDMC
Closing Date:	October 30, 2007

Purchase Price:	$ 55,000,000.00
Total Purchase Price:	**$ 55,000,000.00**
Total amount due from Buyer:	**$ 55,000,000.00**
Less Indemnity Holdback Deposit:	$ 7,500,000.00
Subtotal:	**$ 47,500,000.00**
Total amount due to Seller:	**$ 47,500,000.00**

[SIGNATURE PAGE FOLLOWS]

* * *

---

* * *

ACKNOWLEDGMENT AND RECEIPT

The undersigned, being the duly authorized representative ("*Shareholders' Representative*") of all of the shareholders of Bedford Downs Management Corporation, a Pennsylvania corporation ("*BDMC*"), hereby acknowledges the receipt from Valley View Downs, LP, a Pennsylvania limited partnership ("*VVD*"), pursuant

to that certain Settlement Agreement, dated as of August 14, 2007 (the "*Settlement Agreement*"), by and among BDMC, VVD, Carmen W. Shick, Kendra A. Tabak and Kenneth R. Shick III, and the individuals and entities who are shareholders of BDMC and who are signatories to the Settlement Agreement, and for certain limited purposes specified therein, Merit Management Group Limited Partnership, a Nevada limited partnership ("*Merit*") and the individuals and entities who are partners of Merit and who are signatories to the Settlement Agreement, of $47,500,000, representing the Aggregate Share Purchase Price (as defined in the Settlement Agreement) of $55,000,000 less the Indemnity Deposit (as defined in the Settlement Agreement) of $7,500,000.

IN WITNESS WHEREOF, the Shareholders' Representative has executed this Acknowledgment and Receipt as of the ___ day of October, 2007.

/s/ Carmen W. Schick
Carmen W. Schick,
Shareholders' Representative

---

* * *

STOCK POWER

FOR VALUE RECEIVED, I, **MALVERN BURROUGHS**, do hereby assign and transfer Four Hundred Ninety-Six (496) shares of the Common Stock of BEDFORD DOWNS MANAGEMENT CORPORATION, a Pennsylvania corporation (the "Corporation"),

to **VALLEY VIEW DOWNS, LP**. The aforesaid Four Hundred Ninety-Six (496) shares of the Common Stock of the Corporation are represented by BEDFORD DOWNS MANAGEMENT CORPORATION Certificate No. CS 4 standing in my name on the books of the Corporation.

I do irrevocably constitute ___ attorney to transfer said stock on the books of BEDFORD DOWNS MANAGEMENT CORPORATION with full power of substitution in the premises. Simultaneously with delivery of this Stock Power, the undersigned hereby tenders to the Corporation said Certificate No. CS 4.

Dated as of August 31, 2007.

/s/ Malvern Burroughs
Malvern Burroughs

---

* * *

STOCK POWER

FOR VALUE RECEIVED, I, **CARMEN W. SHICK**, do hereby assign and transfer One Thousand (1,000) shares of the Common Stock of BEDFORD DOWNS MANAGEMENT CORPORATION, a Pennsylvania corporation (the "Corporation") to **VALLEY VIEW DOWNS, LP**. The aforesaid One Thousand (1,000) shares of the Common Stock are represented by BEDFORD DOWNS MANAGEMENT CORPORATION Certificate No. CS 18, standing in my name on the books of the Corporation.

I do irrevocably constitute ___ attorney to transfer said stock on the books of BEDFORD DOWNS MANAGEMENT CORPORATION with full power of substitution in the premises. Simultaneously with delivery of this Stock Power, the undersigned hereby tenders to the Corporation said Certificate No. CS 18.

Dated as of August 31, 2007.

/s/ Carmen W. Shick
Carmen W. Shick

---

* * *

STOCK POWER

FOR VALUE RECEIVED, I, **KENNETH R. SHICK, III**, do hereby assign and transfer One Thousand (1,000) shares of the Common Stock of BEDFORD DOWNS MANAGEMENT CORPORATION, a Pennsylvania corporation (the "Corporation") to **VALLEY VIEW DOWNS, LP**. The aforesaid One Thousand (1,000) shares of the Common Stock are represented by BEDFORD DOWNS MANAGEMENT CORPORATION Certificate No. CS 19, standing in my name on the books of the Corporation.

I do irrevocably constitute ___ attorney to transfer. said stock on the books of BEDFORD DOWNS MANAGEMENT CORPORATION with full power of substitution in the premises. Simultaneously with delivery

of this Stock Power, the undersigned hereby tenders to the Corporation said Certificate No. CS 19.

Dated as of August 31, 2007.

/s/ Kenneth R. Shick III
Kenneth R. Shick III

---

* * *

STOCK POWER

FOR VALUE RECEIVED, I, **KENDRA A. TABAK**, do hereby assign and transfer One Thousand (1,000) shares of the Common Stock of BEDFORD DOWNS MANAGEMENT CORPORATION, a Pennsylvania corporation (the "Corporation") to **VALLEY VIEW DOWNS, LP**. The aforesaid One Thousand (1,000) shares of the Common Stock are represented by BEDFORD DOWNS MANAGEMENT CORPORATION Certificate No. CS 20, standing in my name on the books of the Corporation.

I do irrevocably constitute ___ attorney to transfer said stock on the books of BEDFORD DOWNS MANAGEMENT CORPORATION with full power of substitution in the premises. Simultaneously with delivery of this Stock Power, the undersigned hereby tenders to the Corporation said Certificate No. CS 20.

Dated as of August 31, 2007.

/s/ Kendra A. Tabak
Kendra A. Tabak

---

* * *

STOCK POWER

FOR VALUE RECEIVED, **MERIT MANAGEMENT GROUP, LP**, does hereby assign and transfer One Thousand Six Hundred Six (1606) shares of the Common Stock of BEDFORD DOWNS MANAGEMENT CORPORATION, a Pennsylvania corporation (the "Corporation") are represented by BEDFORD DOWNS MANAGEMENT CORPORATION Certificate No. CS 21, standing in its name on the books of the Corporation.

MERIT MANAGEMENT GROUP, LP does irrevocably constitute ___ attorney to transfer said stock on the books of BEDFORD DOWNS MANAGEMENT CORPORATION with full power of substitution in the premises. Simultaneously with delivery of this Stock Power, the undersigned hereby tenders to the Corporation said Certificate No. CS 21.

Dated as of August 31, 2007

MERIT MANAGEMENT GROUP, LP

By: /s/ Joseph J. Canfora
Name: Joseph J. Canfora
Title: Chief Operating Officer

* * *

CONSENT BY SHAREHOLDERS AND DIRECTORS
OF
BEDFORD DOWNS MANAGEMENT COMPANY
(the "Corporation")

WHEREAS, upon such terms and conditions as set forth in that certain Settlement Agreement (the form of each of which has been heretofore reviewed) (the "*Settlement Agreement*"), to be entered into by and among Valley View Downs, LP ("*Valley View*"), the Corporation, Carmen W. Shick, Kenneth R. Shick, III, Kendra A. Tabak, Malvern Burroughs, Frank G. Salpietro, Robert Bork, Ann McGovern, Jerry Monahan, Thomas Hicks, Julie A. King, Monica Kline, John Kline, Edward Tracey, and Merit Management Group Limited Partnership (each such person is individually a "*Shareholder*" and collectively the "*Shareholders*"), the Shareholders desire to sell all of their stock of the Corporation to Valley View; and

WHEREAS, in connection with the Settlement Agreement it is contemplated that the following documents and agreements, among others, will be executed and delivered (the form of each of which has been heretofore reviewed) (collectively the "*Related Documents*"): (i) Escrow Agreement; and (ii) Real Estate Purchase Agreement; and

WHEREAS, the transactions contemplated by the Settlement Agreement and the Related Documents are hereinafter collectively referred to as the "*Transactions*"; and

WHEREAS, the Shareholders and Directors of the Corporation desire to enter into this Consent in lieu of holding meetings of the Shareholders and the Directors of the Corporation; and

WHEREAS, the undersigned are all of the shareholders and Directors of the Corporation.

NOW, THEREFORE, for the consideration set forth herein and other valuable consideration, and with the intent to be legally bound, the parties hereby consent and agree as follows:

1. Any one officer of the Corporation (each an "*Authorized Officer*") be, and each hereby is, authorized and empowered, in the name and on behalf of. the Corporation, to take any and all actions necessary and/or desirable to consummate the Transactions. In connection therewith, the Settlement Agreement and all of the Related Documents to which the Corporation is a party, are approved and adopted, in the forms heretofore reviewed, with such changes as any one Authorized Officer shall, in his sole discretion, deem necessary or desirable to carry out and consummate the Transactions. Any one Authorized Officer be, and each hereby is, authorized and empowered, in the name and on behalf of the Corporation, to execute, acknowledge, accept and/or deliver the Settlement Agreement, the Related Documents and any and all other resolutions, assignments, deeds, certificates, agreements, instruments, guarantees and/or other documents which may be necessary or desirable pursuant to or in connection with the Transactions, all upon such

terms and conditions as such Authorized Officer shall deem necessary or desirable to carry out and consummate the Transactions and/or to carry out the full intent and purpose of these resolutions, the necessity or desirability of which shall be conclusively evidenced by said Authorized Officer's execution, acknowledgment, acceptance and/or delivery thereof.

2. The Series A Preferred Stock of the Corporation and Series B Preferred Stock of the Corporation are hereby converted to Common Stock. If, to effect said conversion, it is deemed necessary or desirable, any Authorized Officer be, and each hereby is, authorized and empowered, in the name and on behalf of the Corporation, to file an Amendment to the Articles of Incorporation of the Corporation with the Secretary of State. Upon said conversion, Merit Management Group Limited Partnership ("*Merit*") shall be deemed to hold thirty percent (30%) of the outstanding Common Stock of the Corporation, on a fully diluted basis.

3. Each Shareholder hereby waives any and all rights of first refusal, rights second refusal, or any other right to acquire shares, as set forth in: that certain Shareholders Agreement, dated February 15, 2005 (the "*Shareholders Agreement*"), that may arise as a result of the Transactions.

4. Carmen W. Shick, is hereby irrevocably constituted and appointed as Shareholders' Representative, agent and attorney in fact for and on behalf of each of the Shareholders, as contemplated by the Settlement Agreement, for the purpose of distributing any and all

proceeds from the Transactions to the Shareholders after the proceeds are released from escrow. All decisions made by the Shareholders' Representative shall be binding upon each shareholder.

5. The Shareholders hereby agree that upon receipt of the initial disbursement of funds from escrow, as contemplated by Section 1.07(a) of the Settlement Agreement, the Shareholders Agreement will automatically be terminated and of no further force or effect.

6. Merit hereby agrees that upon receipt of the initial disbursement of funds from escrow, as contemplated by Section 1.07(a) of the Settlement Agreement, that certain Casino Management Agreement, dated February 15, 2005, will automatically be terminated and of no further force or effect.

DATED as of the 15th day of August, 2007.

/s/ Joseph Canfora
Joseph Canfora
Director

/s/ Harlan Oppenheim
Harlan Oppenheim
Director

/s/ _____
John DeCaro
Director

/s/ _____
Carmen W. Shick
Shareholder and Director

* * *

* * *

ESCROW AGREEMENT

This Escrow Agreement (this "*Agreement*") dated as of September 4, 2007, is made and entered into by and among Bedford Downs Management Corporation, a Pennsylvania corporation ("*BDMC*"), Valley View Downs, LP, a Pennsylvania limited partnership ("*VVD*"), Carmen W. Shick, Kendra A. Tabak and Kenneth R. Shick III (collectively, the "*Shicks*"), the individuals and entities who are shareholders of BDMC and who are signatories to this Agreement (collectively, including the Shicks in such capacity, the "*Shareholders*"), and Citizens Banks [sic] of Pennsylvania, a Pennsylvania banking corporation (the "*Escrow Agent*"). All references to dollars or $ in this Agreement are to United States dollars, unless otherwise stated herein. All terms not defined herein have the meaning ascribed to them in the Settlement Agreement (as defined herein).

Background Information

A. BDMC, VVD, the Shicks and the Shareholders are parties to a settlement agreement, dated as of August 14, 2007 (the "*Settlement Agreement*") pursuant to which VVD will acquire (a) all of the Shares of BDMC from the Shareholders and the Real Property from the Shicks (the "*Proposed Acquisition*") or, alternatively, (b) only all of the Shares of BDMC from the Shareholders (the "*Alternative Transaction*").

B. The Settlement Agreement requires the Shicks to deposit the Real Property Transfer Documents upon execution of a Real Estate Agreement. The Settlement Agreement further requires, upon execution of this Agreement, each of the Shareholders to deposit certificates representing all of the Shares owned by such Shareholder, duly endorsed for transfer to VVD, or accompanied by appropriate stock powers duly endorsed in blank (the "*Share Certificates*"). The Real Property Transfer Documents and the Share Certificates are to be deposited with an independent third party escrow agent to be held by such escrow agent pursuant to the terms of the Settlement Agreement and this Agreement.

C. The Settlement Agreement further requires VVD, subject to *Section 1.08* of the Settlement Agreement, on or prior to the Escrow Deposit Date, to deposit or cause to be deposited the Escrow Amount with an independent third party escrow agent in an escrow account to be held and disbursed pursuant to the terms and conditions of the Settlement Agreement and the Escrow Agreement.

D. The parties desire to appoint the Escrow Agent to act as the escrow agent for the Escrow Property (as herein defined) and the Escrow Agent desires to accept such appointment in each case on the terms and conditions set forth in this Agreement.

Agreement

In consideration of the premises and the mutual promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties, the parties agree as follows:

Section 1. *Appointment of Escrow Agent; Establishment of Escrow Account.* BDMC, VVD, the Shicks and the Shareholders each hereby appoints the Escrow Agent to act as escrow agent pursuant to the terms and conditions of this Agreement, and the Escrow Agent hereby accepts such appointment. On the date hereof, the Shicks shall deliver the Real Property Transfer Documents to the Escrow Agent, and the Shareholders shall deliver the Share Certificates to the Escrow Agent (collectively, the "*Escrow Documents*"). In addition, at or prior to Closing, the Shareholders shall deliver to the Escrow Agent releases with respect to any liabilities of BDMC owed to Third Party BDMC Creditors (as defined below), which are reasonably acceptable to VVD, and which recite at a minimum that (i) BDMC has no liability to such Third Party BDMC Creditor, or (ii) that upon payment as contemplated in *Section 3(a)(iii)*, BDMC has and will have no further liability to such Third Party BDMC Creditor, who in the event of a payment as contemplated in Section 3(a)(iii) shall covenant to deliver to BDMC at Closing written confirmation of receipt of such payment, if any (the "*Releases*"). On the Escrow Deposit Date, VVD shall deliver or cause to be delivered to the Escrow Agent the Escrow Amount in the form of cash, certified

funds, or an irrevocable letter of credit in favor of the Escrow Agent for the benefit of BDMC, the Shicks and the Shareholders (the "*Escrow Amount*" and collectively with the Escrow Documents, the "*Escrow Property*"). The Escrow Agent shall deposit the Escrow Amount in a separate interest-bearing escrow account (the "*Escrow Account*") and shall hold, administer and dispose of the Escrow Property in accordance with the terms and conditions hereinafter set forth.

Section 2. *Investment of Escrow Funds.*

(a) The Escrow Agent shall act as custodian of the Escrow Amount and shall from time to time invest and reinvest the Escrow Amount, and any portion thereof remaining after the release of certain Escrow Property at Closing as described in *Section 3(a)*, in the CitizensSelect Prime A Fund unless otherwise directed by Shareholders' Representative, or if the designation of the Shareholders' Representative is revoked pursuant to Section 1.05(b) of the Settlement Agreement, a majority in interest of the Shareholders. In the event that the Escrow Agent does not receive directions to invest funds held in the Escrow Account, the Escrow Agent shall invest such funds in the CitizensSelect Prime A Fund, or a successor or similar investment offered by the Escrow Agent. The Escrow Amount, together with all accrued earnings thereon, shall be known as the "*Escrow Funds*." The Escrow Agent shall have the power to sell or liquidate the investments in which the Escrow Funds are invested whenever the Escrow Agent shall be required to release all or any

portion of the Escrow Amount or Escrow Funds pursuant to *Section 3*. The Escrow Agent shall have no responsibility for any investment losses resulting from the investment, reinvestment or liquidation of the Escrow Amount if invested as directed.

(b) The party hereto which ultimately receives the income earned on the Escrow Amount shall be responsible for the payment of all taxes thereon. In the event that any earnings remain undistributed at the end of any calendar year, Escrow Agent shall report to the Internal Revenue Service, or such other authority as it deems appropriate, such earnings as it deems appropriate or as required by any applicable law or regulation or, to the extent consistent therewith, as directed in writing by the parties. Prior to Closing, in the absence of such written directions, undistributed earnings will be attributed to and reported (i) if VVD elects to acquire the Real Property pursuant to the terms of the Settlement Agreement, (A) 26.67% as belonging to the Shicks and (B) 73.33% as belonging to the Shareholders on the basis of their respective Pro Rata Shares, or (b) if VVD elects not to acquire the Real Property pursuant to the terms of the Settlement Agreement, as belonging to the Shareholders on the basis of their respective Pro Rata Shares. After Closing, in the absence of such written directions, undistributed earnings will be attributed to and reported as belonging to the Shareholders on the basis of their respective Pro Rata Shares. In addition, the Escrow Agent shall withhold any taxes it deems appropriate

and shall remit such taxes to the appropriate authorities, if appropriate.

Section 3. *Release of the Escrow Property.*

(a) *Release of Certain Escrow Property at Closing.* No later than one (1) Business Day prior to the consummation of the Proposed Acquisition or the Alternative Transaction, as applicable, VVD, the Shicks and the Shareholders' Representative, or a majority in interest of the Shareholders if the designation of the Shareholders' Representative is revoked pursuant to Section 1.05(b) of the Settlement Agreement, shall deliver to the Escrow Agent a joint written notice (which may be signed in counterparts) (the "*Consummation Notice*"), which notice shall include instructions as to the timing and delivery of the Escrow Funds and Escrow Documents as of the Closing. Following receipt of the Consummation Notice and at Closing:

(i) if the parties are consummating the Proposed Acquisition, the Escrow Agent shall take all of the following interdependent steps simultaneously: (A) release to the Shareholders' Representative, Forty-Seven Million Five Hundred Thousand Dollars ($47,500,000), or if the designation of the Shareholders' Representative has been revoked pursuant to Section 1.05(b) of the Settlement Agreement, release to each Shareholder, an amount equal to Forty-Seven Million Five Hundred Thousand Dollars ($47,500,000) multiplied by such Shareholder's Pro Rata Share, as set forth in *Exhibit 3(a)* attached hereto, less payments made to Third Party Creditors pursuant to

Section 3(a)(iii) below, if any, (B) release to VVD the Escrow Documents and Releases (including written confirmations of receipt of funds by Third Party BDMC Creditors, if any), (C) release to the Shicks Twenty Million Dollars ($20,000,000.00), less all prorations due to the Buyer (as defined in the Real Estate Agreement) under the Real Estate Agreement, (D) release to the Buyer (as defined in the Real Estate Agreement) all prorations due to it under the Real Estate Agreement, and (E) retain the remaining amount of the Escrow Amount in the Escrow Account; or

(ii) if the parties are consummating the Alternative Transaction, the Escrow Agent shall take all of the following interdependent steps simultaneously: (A) release to the Shareholders' Representative, Sixty-Seven Million Five Hundred Thousand Dollars ($67,500,000), or if the designation of the Shareholders' Representative has been revoked pursuant to Section 1.05(b) of the Settlement Agreement, to each Shareholder, an amount equal to Sixty-Seven Million Five Hundred Thousand Dollars ($67,500,000) multiplied by such Shareholder's Pro Rata Share, as set forth in *Exhibit 3(a)* attached hereto, less payments made to Third Party Creditors pursuant to *Section 3(a)(iii)* below, if any, (B) release to VVD the Share Certificates and Releases (including written confirmations of receipt of funds by Third Party BDMC Creditors, if any), (C) release to the

Shicks the Real Property Transfer Documents, and (D) retain the remaining amount of the Escrow Amount in the Escrow Account.

(iii) In the event of the release of the Escrow Property either pursuant to the Proposed Acquisition or the Alternative Transaction, the Shicks, in their capacity as Shareholders, may designate in writing, at least one (1) Business Day prior to the consummation of the Proposed Acquisition or the Alternative Transaction, that a portion of their share of the amounts released to the Shareholders' Representative or Shareholders, as the case may be, pursuant to *Section 3(a)(i)(A)* or *3(a)(ii)(A)* (the "*Initial Distribution*") be paid by the Escrow Agent to third parties to whom BDMC is known to be obligated immediately prior to the Closing ("*Third Party BDMC Creditors*"). In the event of such a written designation the Escrow Agent shall pay such Third Party BDMC Creditors the amounts identified in such written designation, and shall reduce the amount of the Initial Distribution released to the Shareholders' Representative or, if the designation of the Shareholders' Representative has been revoked pursuant to Section 1.05(b) of the Settlement Agreement, to the Shicks, in their capacity as Shareholders, on an equal basis, by the amount paid to the Third Party BDMC Creditors.

(b) *Claims.*

(i) *VVD Claims Against the Escrow Account.* Upon receipt by the Escrow Agent, at any time after the Closing and on or before the Final Payment Date (as defined below), of a written notification (each, a "*Claim Notice*"), signed by the general partner of VVD with respect to a claim for indemnification pursuant to the Settlement Agreement and the Real Estate Agreement (each, a "*Claim*"), which shall include (A) a statement that an Indemnitee believes it is entitled to indemnification pursuant to the Settlement Agreement, (B) a statement specifying in reasonable detail the nature and amount of such Indemnitee's Damages (or VVD's good faith estimate of such amount, in the event the underlying claim or liability is not then liquidated or determined) (the "*Claim Amount*"), and providing documentation to the extent available as support for such Claim Amount, and (C) the name of the Indemnitee to whom the Claim is to be paid and the address or wire transfer instructions to which such payment should be sent, the Escrow Agent shall, subject to the provisions of *Section 3(b)* hereof, make payment to the party specified in such Claim Notice out of the Escrow Account, as promptly as practicable after compliance with the provisions of *Section 3(b)(ii)* hereof (including, without limitation, the ten (10) day waiting period set forth therein) and the resolution of all conflicts, if any, under *Section 3(b)(iii)* hereof, of cash in an amount equal to the

Claim Amount (as such amount is finally determined in accordance with this Escrow Agreement).

(ii) *Objections to Claims.*

(A) At the time of delivery of any Claim Notice to the Escrow Agent, a duplicate copy of such notice shall be delivered to the Shareholders' Representative, or if the designation of the Shareholders' Representative has been revoked, to each Shareholder, and for a period of ten (10) Business Days after such delivery, the Escrow Agent shall make no payment to the payee identified in such Claim Notice of any amounts from the Escrow Account pursuant to *Section 3(b)(i)* hereof unless the Escrow Agent shall have received written authorization from the Shareholders' Representative or a majority in interest of the Shareholders, as the case may be, to make such delivery. After the expiration of such ten (10) day period, the Escrow Agent shall make payment from the Escrow Account, in accordance with *Section 3(b)(i)* hereof, **provided however**, that no such payment or delivery shall be made if the Shareholders' Representative or a majority in interest of the Shareholders, as the case may be, shall object in reasonable detail in a written statement to the Claim made in the Claim Notice, and such statement shall have been delivered to and received by the Escrow Agent and VVD prior to the

expiration of such ten (10) day period. Notwithstanding the foregoing, if a court of competent jurisdiction pursuant to Section 9.12 of the Settlement Agreement has made a final, non-appealable determination of the amount of Damages or in the case of Damages arising from or relating to a Proceeding, the date on which both such amount and Indemnitor's obligation to pay such amount have been determined by a final, non-appealable judgment of the trial court or administrative body having jurisdiction over such Proceeding, a final determination shall be deemed to have occurred and the Shareholders shall have no right to object to a Claim that is consistent with such determination and the Escrow Agent shall either disburse the amount of the Claim per the Claim Notice or deposit such amount into the court or administrative body having jurisdiction over such Claim.

(B) If the Shareholders' Representative or a majority in interest of the Shareholders, as the case may be, shall timely object to any Claim pursuant to *Section 3(b)(ii)(A)*, then (1) such disputed Claim shall be deemed to be an "*Open Claim*," (2) the Escrow Agent shall reserve against and hold in the Escrow Account the amount of such Claim as specified in the Claim Notice (such amount reserved with respect to each Open Claim, a "*Claim Reserve*"), and

(3) any income earned on such Claim Reserve shall be held in the Escrow Account until the related Open Claim is resolved by either a Joint Instruction or a Final Determination, whereupon such income shall be paid as provided therein. If either the Joint Instruction or the Final Determination (as applicable) does not provide for the disbursement of income on the Claim Reserve to an Indemnitee, such income shall be disbursed thereafter in accordance with *Section 2(b)*.

(C) The amount constituting the Claim Reserve shall be paid by the Escrow Agent from and to the extent of the balance remaining in the Escrow Account and only in accordance with (1) a Joint Instruction (as hereinafter defined) or (2) a Final Determination (as hereinafter defined). The Escrow Agent shall act on such Joint Instruction or Final Determination, as the case may be, without further question.

(iii) *Resolution of Conflicts.*

(A) In case the Shareholders' Representative or a majority in interest of the Shareholders, as the case may be, shall rightfully object in writing to any Claim made in any Claim Notice, VVD and the Shareholders shall attempt in good faith to agree upon the rights of the respective parties with respect to each such Open Claim. If VVD and the Shareholders

should so agree on a resolution, a memorandum setting forth such agreement shall be prepared and signed by both parties and shall be furnished to the Escrow Agent (a "*Joint Instruction*"). The Escrow Agent shall be entitled to rely on any Joint Instruction in accordance with the terms thereof.

(B) If no such agreement can be reached after good faith negotiation, and in any event at any time on or after twenty (20) Business Days after receipt of the written objection of the Shareholders' Representative or a majority in interest of the Shareholders, as the case may be, either VVD or the Shareholders may file an action in accordance with *Section 9.12* of the Settlement Agreement. The final result of such action (a "*Final Determination*") shall be binding and conclusive upon the parties to this Escrow Agreement, and notwithstanding anything in *Section 5(b)(ii)* hereof, the Escrow Agent shall be entitled to act in accordance with such Final Determination.

(c) On the fifth (5th) Business Day following the *earlier* of: (i) the date that is two (2) years after the opening by VVD at the site of the Racing License of a gaming facility pursuant to a license issued by the Pennsylvania Gaming Control Board or (ii) the date that is three (3) years after the Escrow Deposit Date, VVD and the Shareholders' Representative, or if the designation of the Shareholders' Representative has

been revoked, a majority in interest of the Shareholders, shall deliver to the Escrow Agent a joint written notice (which may be signed in counterparts) (the "*Final Payment Notice*"), which notice shall include instructions as to the delivery of the funds remaining in the Escrow Account minus the amount of any Claim Reserve (the "*Escrow Account Balance*"). The Escrow Agent shall, upon receipt of the Final Payment Notice, promptly disburse the Escrow Account Balance to the Shareholders' Representative, or if the designation of the Shareholders' Representative has been revoked pursuant to Section 1.05(b) of the Settlement Agreement, to the Shareholders according to their Pro Rata Shares.

(d) If the Settlement Agreement is properly terminated, pursuant to and as may be permitted by the Settlement Agreement, prior to Closing (i) if VVD has deposited the Escrow Amount into the Escrow Account, the Escrow Agent shall promptly return the Escrow Amount and all accrued interest thereon to VVD, and the Escrow Agent shall promptly return the Real Property Transfer Documents to the Shicks and the Share Certificates and Releases to the Shareholders' Representative or the Shareholders, as the case may be, and (ii) if VVD has not deposited the Escrow Amount into the Escrow Account, the Escrow Agent shall promptly return the Real Property Transfer Documents to the Shicks and the Share Certificates and the Releases to the Shareholders' Representative or the Shareholders, as the case may be.

(e) This Agreement will terminate upon the release of all of the Escrow Funds pursuant to this *Section 3.*

(f) In the event fund transfer instructions are given (other than in writing at the time of execution of this Escrow Agreement), whether in writing or by telecopier, the Escrow Agent is authorized to seek confirmation of such instructions from representatives of VVD, the Shicks and the Shareholders by telephone call-back to the person or persons designated on *Exhibit A* hereto, and the Escrow Agent may rely upon the confirmation of anyone purporting to be the person or persons so designated. Each funds transfer instruction shall be executed by an authorized signatory, a list of such authorized signatories is set forth on *Exhibit A.* The undersigned is authorized to certify that the signatories on *Exhibit A* are authorized signatories. The persons and telephone numbers for call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. The Escrow Agent and the beneficiary's bank in any funds transfer may rely solely upon any account numbers or similar identifying numbers provided by VVD, the Shicks or the Shareholders' Representative, or if the designation of the Shareholders' Representative has been revoked, the Shareholders, to identify (i) the beneficiary, (ii) the beneficiary's bank, or (iii) an intermediary bank. The Escrow Agent may apply any of the escrowed funds for any payment order it executes using any such identifying number, even when its use may result in a person other than the beneficiary being paid, or the transfer

of funds to a bank other than the beneficiary's bank or an intermediary bank designated. The parties to this Escrow Agreement acknowledge that these security procedures are commercially reasonable.

Section 4. *Language Concerning the Escrow Agent and Miscellaneous Provisions.*

To induce the Escrow Agent to act hereunder, it is further agreed by the undersigned that:

(a) The Escrow Agent shall not be under any duty to give the Escrow Property held by it hereunder any greater degree of care than it gives its own similar property and shall not be required to invest any funds held hereunder except as directed in this Agreement.

(b) This Agreement expressly sets forth all the duties of the Escrow Agent with respect to any and all matters pertinent hereto. No implied duties or obligations shall be read into this Agreement against the Escrow Agent. The Escrow Agent shall not be bound by the provisions of any agreement among the other parties hereto except as may be referenced in this Agreement.

(c) The Escrow Agent shall not be liable, except for a breach of this Agreement, or its own gross negligence or willful misconduct and, except with respect to claims based upon such breach, gross negligence or willful misconduct that are successfully asserted against the Escrow Agent, the other parties hereto shall jointly and severally indemnify and hold harmless the Escrow Agent (and any successor Escrow

Agent) from and against any and all losses, liabilities, claims, actions, damages and expenses, including reasonable attorneys' fees and disbursements, arising out of and in connection with this Agreement. Without limiting the foregoing, the Escrow Agent shall in no event be liable in connection with its investment or reinvestment of any cash held by it hereunder in good faith, in accordance with the terms hereof, including without limitation any liability for any delays (not resulting from its gross negligence or willful misconduct) in the investment or reinvestment of the Escrow Property, or any loss of interest incident to any such delays.

(d) The Escrow Agent shall be entitled to rely upon any order, judgment, award, certification, demand, notice, instrument or other writing delivered to it hereunder without being required to determine the authenticity or the correctness of any fact stated therein or the propriety or validity of the service thereof. The Escrow Agent may act in reliance upon any instrument or signature believed by it to be genuine and may assume that any person purporting to give receipt or advice or make any statement or execute any document in connection with the provisions hereof has been duly authorized to do so.

(e) The Escrow Agent may act pursuant to the advice of counsel with respect to any matter relating to this Agreement and shall not be liable for any action taken or omitted in good faith in accordance with such advice.

(f) The Escrow Agent does not have any interest in the Escrow Property deposited hereunder, but is serving as escrow holder only and having only possession thereof. Any payments of income from this Escrow Account shall be subject to withholding regulations then in force with respect to United States taxes. The parties hereto will provide the Escrow Agent with appropriate W-9 forms for tax I.D. number certifications, or W-8 forms for non-resident alien certifications. It is understood that the Escrow Agent shall be responsible for income reporting only with respect to the income earned on investment of funds which are a part of the Escrow Property and is not responsible for any other reporting. This *Section 4(c)* and this *Section 4(f)* shall survive notwithstanding any termination of this Agreement or the resignation of the Escrow Agent.

(g) The Escrow Agent makes no representation as to the validity, value, genuineness or the collectibility of any security or other document or instrument held by or delivered to it.

(h) The Escrow Agent shall not be called upon to advise any party as to the wisdom in selling or retaining or taking or refraining from any action with respect to any securities or other property deposited hereunder.

(i) The Escrow Agent (and any successor Escrow Agent) may at any time resign as such by delivering the Escrow Property to any successor Escrow Agent jointly designated by the other parties hereto in writing, or to any court of competent jurisdiction,

whereupon the Escrow Agent shall be discharged of and from any and all further obligations arising in connection with this Agreement. The resignation of the Escrow Agent will take effect on the earlier of (a) the appointment of the successor (including a court of competent jurisdiction) or (b) the day which is thirty (30) days after the date of delivery of its written notice of resignation to the other parties hereto. If within the thirty (30) days set forth in this *Section 4(i)(b)*, the Escrow Agent has not received a joint designation of a successor Escrow Agent from VVD, the Shicks and the Shareholders' Representative, or if the designation of the Shareholders' Representative has been revoked pursuant to Section 1.05(b) of the Settlement Agreement, from a majority in interest of the Shareholders, the Escrow Agent's sole responsibility after that time shall be to safekeep the Escrow Property until receipt of a designation of successor Escrow Agent of a joint written disposition instruction by the other parties hereto or a final order of a court or arbitration panel of competent jurisdiction.

(j) The Escrow Agent shall have no responsibility for the contents of any writing of the arbitrators or any third party contemplated herein as a means to resolve disputes and may rely without any liability upon the contents thereof.

(k) In the event of any disagreement between the other parties hereto resulting in adverse claims or demands being made in connection with the Escrow Property, or in the event that the Escrow Agent in good

faith is in doubt as to what action it should take hereunder, the Escrow Agent shall be entitled (i) to file an interpleader action with a court of competent jurisdiction and to tender the Escrow Property to such court, or (ii) to retain the Escrow Property until the Escrow Agent shall have received (A) a final non-appealable order of a court of competent jurisdiction directing delivery of the Escrow Property or (B) a written agreement executed by VVD, the Shicks and the Shareholders' Representative, or a majority in interest of the Shareholders if the designation of the Shareholders' Representative is revoked, directing delivery of the Escrow Property, in which event the Escrow Agent shall disburse the Escrow Property in accordance with such order or agreement. Any court order shall be accompanied by a legal opinion by counsel for the presenting party reasonably satisfactory to the Escrow Agent to the effect that said order is final and non-appealable. The Escrow Agent shall act on such order and legal opinion without further question.

(l) The Escrow Agent shall be entitled to compensation for its services hereunder as per *Exhibit B* attached hereto, all to be paid one-half by VVD and one-half by the Shareholders.

(m) The parties hereto hereby irrevocably submit to the jurisdiction of the Court of Common Pleas of Lawrence County or, if it has jurisdiction, the United States District Court for the Western District of Pennsylvania, in any action or proceeding with the Escrow Agent arising out of or relating to the interpretation of this Agreement, and the parties hereby irrevocably

agree that all claims in respect of such action or proceeding shall be heard and determined in the Court of Common Pleas of Lawrence County or, if it has jurisdiction, the United States District Court for the Western District of Pennsylvania. The parties hereby consent to and grant to any such court jurisdiction over the persons of such parties and over the subject matter of any such dispute and agree that delivery or mailing of any process or other papers in the manner provided in *Section 4(q)*, or in such manner as may be permitted by law, shall be valid and sufficient service thereof.

(n) This Agreement shall be binding upon and inure solely to the benefit of the parties hereto and their respective heirs, successors and assigns and shall not be enforceable by or inure to the benefit of any third party except as provided in *Section 4(i)* with respect to a resignation by the Escrow Agent. No party may assign any of its rights or obligations under this Agreement without the written consent of the other parties. This Agreement shall be construed in accordance with and governed by the internal law of the Commonwealth of Pennsylvania (without reference to its rule as to conflicts of law).

(o) This Agreement may be executed in separate counterparts, each of which will be an original and all of which taken together shall constitute one and the same agreement, and any party hereto may execute this Agreement by signing any such counterpart.

(p) This Agreement may only be modified by a writing signed by all of the parties hereto, and no

waiver hereunder shall be effective unless in a writing signed by the party to be charged.

(q) Any notice or communication to be given hereunder by any party to another party shall be deemed given if in writing and delivered personally, sent by prepaid registered or certified mail, return receipt requested, sent by reputable overnight courier service or sent by electronically confirmed facsimile transmission, to the respective party at the following addresses:

If to Escrow Agent:	Citizens Bank of Pennsylvania 870 Westminster Street RWR 110 Providence, Rhode Island 02903 Attn: Jean A. Parrillo, Vice President Fax: (401) 455-5279
If to VVD:	10 West Market Street, Suite 200 Indianapolis, Indiana 46204 Attention: Kurt Wilson Facsimile: 317-656-8780 E-mail: kwilson@centaurgaming.net
With a copy to (which copy shall not constitute notice hereunder):	Ice Miller LLP One American Square, 31st Floor Indianapolis, Indiana 46282 Attention: Stephen J. Hackman Facsimile: 317-592-4666 E-mail: Stephen.hackman@ icemiller.com

If to BDMC, the Shareholders and the Shicks:	Carmen W. Shick 2959 Benjamin Franklin Parkway Edinburg, Pennsylvania Facsimile: (724) 654-9397 E-mail: cwshick@aol.com
With a copy to (which copy shall not constitute notice hereunder):	Meyer, Unkovic & Scott LLP 1300 Oliver Building Pittsburgh, PA 15222 Attention: Frank G. Salpietro Facsimile: (412) 456-3293 E-mail: fgs@muslaw.com

or to such other address as any party may designate by notice to the other parties given in accordance with the provisions hereof.

(r) **IN NO EVENT SHALL THE ESCROW AGENT BE LIABLE, DIRECTLY OR INDIRECTLY, FOR ANY (i) DAMAGES OR EXPENSES ARISING OUT OF THE SERVICES PROVIDED HEREUNDER, OTHER THAN DAMAGES WHICH RESULT FROM THE ESCROW AGENT'S FAILURE TO ACT IN ACCORDANCE WITH THE STANDARDS SET FORTH IN THIS AGREEMENT, OR (ii) SPECIAL OR CONSEQUENTIAL DAMAGES, EVEN IF THE ESCROW AGENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

(s) Any banking association or corporation into which the Escrow Agent may be merged, converted or with which the Escrow Agent may be consolidated, or any corporation resulting from any merger, conversion

or consolidation to which the Escrow Agent shall be a party, or any banking association or corporation to which all or substantially all of the corporate trust business of the Escrow Agent shall be transferred, shall succeed to all the Escrow Agent's rights, obligations and immunities hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

(t) Notwithstanding any other provision of this Agreement, the Escrow Agent shall not be obligated to perform any obligation hereunder and shall not incur any liability for the nonperformance or breach of any obligation hereunder to the extent that the Escrow Agent is delayed in performing, unable to perform or breaches such obligation because of acts of God, war, terrorism, fire, floods, strikes, electrical outages, equipment or transmission failures, or other causes reasonably beyond its control.

[*Signature pages follow*]

* * *

---

* * *

NOTICE OF DISTRIBUTION BY SHAREHOLDERS' REPRESENTATIVE

Shareholder Name:		Merit Management Limited Partnership
Percentage Ownership:		30.007%
Distribution Analysis:		
(a) Gross Initial Settlement Payment:		$47,500,000*
(b) Multiplied by Percentage Ownership:		30.007%
(c) Subtotal:		$14,253,325
(d) Less Deductions:	Wire Fee	($25.00)
	Assignment to Ed Tracy	($540,186)
DISTRIBUTION TO SHAREHOLDER:		**$13,713,114**

The "DISTRIBUTION TO SHAREHOLDER" was paid by wire transfer per shareholder instruction on the date set forth herein.

Date:
October ___, 2007

/s/ Carmen W. Shick
Carmen W. Shick,
Shareholder Representative

* * *

* The total settlement to be paid to the Shareholders of BDMC by Centaur/Valley View for the shares of BDMC, per the Settlement Agreement signed by all Shareholders, is $55,000,000. However, per that same Agreement $7,500,000 is being retained as an "Indemnity Deposit" which will be released at a future date identified in the Agreement (net any indemnity claims). An additional distribution will be made when the Indemnity Deposit is released to the Shareholders' Representative.

CARMEN W. SHICK
SHAREHOLDERS' REPRESENTATIVE TO FORMER SHAREHOLDERS OF BEDFORD DOWNS MANAGEMENT CORPORATION
2859 BENJAMIN FRANKLIN PARKWAY
EDINBURG, PA 16116
(724) 654-5538

To: Merit Management Group, LP

Date: November 9, 2010

RE: Final Distribution of Escrow from Valley View Downs Settlement

I am pleased to advise that a final disbursement of the Bedford Downs/Valley View Downs settlement escrow has been made from the escrow account being held pursuant to the settlement, and that you will receive a portion of that disbursement as set forth in this Memo as soon as practicable after execution and return of this Memo as set forth below.

1. **The total amount payable to you will be $2,274,867.99.**

2. This amount was calculated as follows:

   (A) Beginning principal amount in escrow: $7,500,000;

   (B) Plus Interest earned: $311,124.38.

   (C) Gross amount available for distribution: $7,811,124.38.

   (D) Less professional fees: ($30,000.00)

   (E) Net available for distribution: $7,781,124.38

(F) Less Amount Due to Ed Tracy (Per 10/26/07 Agreement): $60,014.00.

(G) Your former percentage of ownership at Bedford Downs: 30.007%

(H) TOTAL TO BE DISTRIBUTED TO YOU (E x G - F): $2,274,867.99[1]

3. The amount set forth in Paragraph 1 above will be sent by wire transfer to the account you previously designated as follows:

Account Name:	Merit Management Group LP
Bank Name:	First Midwest Bank
ABA Number:	071901604
Acct. Number:	[redacted]

4. By signing this Memo and receiving the distribution as set forth herein, you are agreeing and acknowledging that:

(a) You understand and agree to the terms set forth in this Memo;

(b) The distribution being made and the amount set forth in this Memo constitutes the full and

---

[1] You are solely responsible for any claims, taxes, fees, assessments or any other amounts due to any person, including but not limited to any federal, state, or local taxing or governmental authority as a result of this distribution. No representation or warranty is being made with respect to any tax or financial matter relating to this transaction or distribution. You should consult with any tax, financial and/or legal advisors of your choice with respect to this matter. In due course, you may receive an IRS Form 1099 or other documents which may be required by law or which, based on the reasonable judgment of any of my financial or legal advisors, should be sent to you.

final payment due to you by virtue of the Settlement Agreement between Bedford Downs and its former shareholders, on the one hand, and Valley View Downs, on the other hand;

(c) You have no claims against Bedford Downs Management Corporation or any of its former officers, directors, shareholders, agents or representatives, and to the extent you ever had or have any claims, present or future, known or unknown, against Bedford Downs Management Corporation or any of its former officers, directors, shareholders, agents or representatives, you voluntarily and forever RELEASE and RELINQUISH any such claims;

(d) You have consulted, or have been given the full opportunity to consult, with your legal, financial and/or other professional advisors regarding this Memo or the transaction contemplated by this Memo.

PLEASE SIGN AND RETURN THE *ORIGINAL* OF THIS MEMO TO:

Frank G. Salpietro, Esquire
Rothman Gordon, P.C.
310 Grant Street, Third Floor
Pittsburgh, PA 15219

To expedite payment and transfers, you should also fax or email a full, signed copy of this Memo to both me and Frank, as follows:

To Carmen:
Email = cwshick@aol.com
Fax = (724) 654-9397

To Frank:
Email = fgsalpietro@rothmangordon [sic]
Fax = (412) 281-7304

Regards,

/s/ Carmen W. Shick
Carmen W. Shick,
Shareholder Representative

I HEREBY ACKNOWLEDGE AND AGREE TO THE TERMS OF THE FOREGOING MEMO

MERIT MANAGEMENT GROUP, LP
BY: TALC, LLC, its general partner

/s/ Joe Canfora
By: **Joe Canfora**

Date: 11/9/2010

cc: Frank G. Salpietro, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust, Plaintiff, v. MERIT MANAGEMENT GROUP, LP, Defendant.	Case No. 1:11-cv-07670 The Honorable Judge Joan B. Gottschall

AMENDED EXHIBIT 1 TO DECLARATION OF JOSEPH CANFORA ATTACHED TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS [DKT. 60]

(Filed Nov. 6, 2014)

SETTLEMENT AGREEMENT

DATED AS OF THE 14TH DAY OF AUGUST, 2007

BY AND AMONG BEDFORD DOWNS MANAGEMENT CORPORATION,

VALLEY VIEW DOWNS, LP,

CARMEN W. SHICK,

KENDRA A. TABAK,

KENNETH R. SHICK III,

THE SHAREHOLDERS WHO ARE SIGNATORIES HERETO,

MERIT MANAGEMENT GROUP LIMITED PARTNERSHIP

AND

THE MERIT PARTNERS WHO ARE SIGNATORIES HERETO

---

* * *

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (*"Agreement"*), dated as of August 14, 2007 is made and entered into by and among Bedford Downs Management Corporation, a Pennsylvania corporation ("BDMC"), Valley View Downs, LP, a Pennsylvania limited partnership ("VVD"), Carmen W. Shick, Kendra A. Tabak and Kenneth R. Shick III (collectively, the *"Shicks"*), and the individuals and entities who are shareholders of BDMC and who are signatories to this Agreement (collectively, including the Shicks in such capacity, the *"Shareholders"*), and for the limited purposes of the representation and warranty set forth In [sic] *Section 2.04*, delivering the non-compete agreements pursuant to *Section 5.02(d)*, the releases pursuant to *Section 5.02(e)* and the obligations set forth in *Section 8.04*, Merit Management Group Limited Partnership, a Nevada limited partnership ("Merit") and the individuals and entities who are partners of Merit and who are signatories to this Agreement (collectively, in such capacity, the *"Merit Partners"* and collectively with Merit, the *"Merit Group"*). Capitalized terms not otherwise defined in the text of this Agreement are defined in *Exhibit A* attached hereto.

RECITALS

WITNESSETH:

WHEREAS, the Shareholders are the record and beneficial owners of all of the outstanding equity interests in BDMC; and

WHEREAS, on or about June 9, 2003, BDMC filed with the Pennsylvania State harness [sic] Racing Commission (the "HRC") an Application for Harness Racing License with Pari-Mutuel Wagering, and subsequently filed several supplements thereto (collectively, the "*BDMC Application*"); and

WHEREAS, on or about December 27, 2002, VVD filed with the HRC an Application for Harness Racing License with Pari-Mutuel Wagering, and subsequently filed a supplement thereto (collectively, the "*VVD Application*" and collectively with the BDMC Application, the "*Applications*"); and

WHEREAS, pursuant to a duly-issued Statement of Policy, issued by the HRC on April 3, 2003, BDMC and VVD were part of the same consideration group, such that their license applications were considered and are being considered comparatively by the HRC; and

WHEREAS, BDMC and VVD petitioned, and were granted, the right to intervene in one another's licensing proceeding; and

WHEREAS, following the opportunity for public comment on both applications, the HRC held extensive

administrative hearings on October 25-27, 2004, November 9-12, 2004 and February 21, 2005, wherein BDMC and VVD presented extensive testimony, introduced numerous exhibits, and were subject to cross examination by the other party, questions from the HRC and background investigations by the HRC's staff; and

WHEREAS, after the extensive administrative hearings, the HRC entered an Order dated November 3, 2005, denying the BDMC Application and VVD Application, and subsequently issued an Adjudication relating to that Order on November 9, 2005; and

WHEREAS, BDMC and VVD each appealed the denial of their respective application to the Commonwealth Court of Pennsylvania, and the HRC was a named appellee in each of those appeals; and

WHEREAS, after considering the briefs and arguments of BDMC, VVD and the HRC, the Commonwealth Court of Pennsylvania, on June 19, 2006, issued an Opinion and Order, affirming the HRC's denial of the VVD Application, reversing the denial of the BDMC Application, and remanding the BDMC Application for further proceeding before the HRC; and

WHEREAS, the HRC and VVD each filed Petitions for Allowance of Appeal with the Supreme Court of Pennsylvania (the "*Supreme Court*"), which Petitions were granted by the Supreme Court, and the appeals were consolidated, briefed and argued before the Supreme Court; and

WHEREAS, on July 2, 2007, the Supreme Court issued its Opinion in the consolidated appeals, granting both BDMC and VVD the ability to reapply and seek reconsideration of the HRC's denials of their Applications; and

WHEREAS, consistent with the mandate of the Supreme Court, on July 19, 2007, the HRC entered an Order permitting both BDMC and VVD to supplement or amend the Applications; and

WHEREAS, BDMC, the Merit Group, the Shareholders, VVD and the Shicks are cognizant of the timeframes set forth in the Pennsylvania Race Horse Development and Gaming Act (*"Gaming Act"*) for the filing of an application for a "Category 1" gaming license with the Pennsylvania Gaming Control Board, and that absent a filing for such a gaming license within the timeframes set forth in the Gaming Act there is a substantial risk that the Category 1 (racetrack) license could be converted by the Pennsylvania Gaming Control Board to a Category 2 (stand-alone) gaming license, and that such a conversion would be to the severe detriment, and not in the best interests, of harness racing in Pennsylvania; and

WHEREAS, continuation of adversarial licensing hearings, and the likelihood of appeals being taken by BDMC, VVD or the HRC, absent a resolution as contemplated hereby, would not be in the interest of the parties, the Commonwealth of Pennsylvania or in the best interests of harness racing in Pennsylvania; and

WHEREAS, BDMC, the Merit Group, the Shareholders, VVD and the Shicks deem it in their best collective interests and in the best interest of harness racing that the parties avoid the expense and uncertainty of continued litigation and adversarial administrative proceedings, and to resolve matters relating to the BDMC Application and VVD Application to achieve these goals;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and promises contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

AGREEMENT

ARTICLE I.
AGREEMENTS WITH RESPECT TO THE APPLICATIONS

Section 1.01. Filing of Applications. On or before August 17, 2007, and consistent with the deadline set forth in the HRC's Order of July 19, 2007, and its letter of August 3, 2007, granting a two-week extension of such deadline (ratified by the Order of the HRC dated August 10, 2007):

(a) BDMC shall file with the HRC a Fourth Supplement/Amendment to the BDMC Application (the "*BDMC Amended Application*"); and

(b) VVD shall file with the HRC a Third Supplement/Amendment to the VVD Application (the "*VVD Amended Application*"), which shall seek, among other things:

(i) a license to construct and operate a harness horse race track and facility with pari-mutuel wagering (a "*Racing License*") on approximately 250 acres currently owned by the Shicks and identified on one of the drawings attached hereto as *Exhibit B*, as determined by VVD in its discretion (the "*Real Property*");

(ii) at VVD's option, the VVD Amended Application may propose as an alternate site (the "*Alternate Site*") for a Racing License, the property originally proposed by VVD (plus any adjacent property purchased or under option) in its Application and "Phase II" submission; provided however, that VVD agrees that it will not construct and operate a harness horse race track and facility on the Alternate Site except pursuant to *Section 1.08(b)*;

(iii) VVD shall request that, if the HRC issues a Racing License to VVD, the Racing License contain an express condition that the Racing License shall automatically terminate or be revoked if VVD fails to deposit the Escrow Amount (as defined below) with the Escrow Agent (as defined below) on the date set forth in this Agreement, pursuant to and in accordance with the terms and conditions of this Agreement. If the Racing License issued

to VVD does not contain the condition described in this paragraph, VVD will immediately request the HRC to amend the Racing License to include such a condition. Notwithstanding the failure of the Racing License to include such condition, VVD agrees to abide by the terms of such condition as if the condition had been included. In the event that the Racing License is issued to VVD and thereafter is terminated or revoked by reason of VVD's failure to timely deposit the Escrow Amount into the Escrow Account in accordance with the terms of this Agreement, VVD agrees that it will not object, appeal, or assert any hearing right or other right to challenge the granting of a Racing License to BDMC.

Section 1.02. Filing of Stipulation. Immediately upon the execution of this Agreement, VVD and BDMC shall file a Stipulation Concerning Procedures Before the Commission substantially in the form set forth in *Exhibit 1.02* attached hereto (the "*Stipulation*").

Section 1.03. Agreement to Purchase Real Property.

(a) On or before August 17, 2007, VVD shall deliver to the Shicks a draft Purchase and Sale Agreement (the "*Real Estate Agreement*"), providing for the purchase of the Real Property from the Shicks by VVD at the Closing. VVD's right and obligation to purchase the Real Property pursuant to the Real Estate Agreement shall be conditioned upon the timely deposit by VVD of the Escrow

Amount (as defined herein) into the Escrow Account (as defined herein), the grant of the Racing License to VVD for the construction and operation of a harness horse racing facility on the Real Property, and the payment of the Escrow Amount as set forth herein. VVD's obligation to purchase the Real Property shall be further conditioned upon VVD's satisfaction with the results of its due diligence investigation as described in *Section 1.08*. VVD and the Shicks agree to negotiate in good faith with the intention of executing a mutually agreeable Real Estate Agreement within two (2) weeks after delivery by VVD of a draft of the Real Estate Agreement.

(b) The Real Estate Agreement shall also provide that VVD shall have the right to acquire from the Shicks without additional consideration up to an additional 25 acres of land as necessary to enable VVD to construct adequate barns, surface parking spaces and an appropriate entry feature for the race track and casino project on the Real Property if such additional property is required by the HRC, the Pennsylvania Gaming Control Board or a Zoning Board. Any additional land acquired by VVD pursuant to this *Section 1.03(b)* shall be considered part of the Real Property for all purposes of this Agreement and the Real Estate Agreement.

Section 1.04. Purchase of Shares. Upon the terms and subject to the conditions set forth in this Agreement and on the basis of the representations, warranties, covenants and agreements herein contained, at the Closing, VVD shall purchase, acquire

and accept from the Shareholders, and each of the Shareholders shall sell, transfer, assign, convey and deliver to VVD, all of such Shareholder's right, title and interest in and to all of the outstanding shares of capital stock of BDMC owned by such Shareholder (the "*Shares*"), free and clear of all Encumbrances of any kind or character.

Section 1.05. Real Property Purchase Price; Payments to Shareholders.

(a) The consideration to be paid by VVD to the Shicks in connection with the purchase of the Real Property shall be Twenty Million Dollars ($20,000,000) (the "*Real Property Purchase Price*").

(b) The consideration to be paid by VVD for the Shareholders' Shares shall be Fifty-Five Million Dollars ($55,000,000) or such higher amount as set forth in Section 1.08(c) (the "*Aggregate Share Purchase Price*"). The Shareholders hereby designate Carmen W. Shick as their representative (the "*Shareholders' Representative*") and authorize said Shareholders' Representative to receive all payments of the Escrow Amount for and on behalf of the Shareholders, and to distribute such payment(s) in such manner as the Shareholders may then or thereafter agree. VVD shall authorize the Escrow Agent to make all payments of the Escrow Amount due to the Shareholders to the Shareholders' Representative. For purposes of this Agreement and the Escrow Agreement, any payments made to the Shareholders' Representative by VVD shall be treated as if made directly to the Shareholders and VVD shall have no responsibility to account to any Shareholder as to the

correct allocation of such Shareholder's distribution of amounts hereunder. Upon the unanimous written direction from all of the Shareholders of the revocation of the designation of the Shareholders' Representative prior to a disbursement, VVD will make, or cause to be made, payments directly to each Shareholder for such Shareholder's Shares in an amount equal to the Aggregate Share Purchase Price *multiplied by* (ii) a fraction (such fraction, the "*Pro Rata Share*"), the numerator of which is the number of common shares of BDMC owned by such Shareholder as of the Closing, and the denominator of which is the total number of common shares of BDMC outstanding as of the Closing, assuming, in each case, the exercise of all options, warrants or other rights to acquire such common shares and the conversion of all debt and equity securities that are convertible into such common shares (such amount, the "*Share Purchase Price*" of such Shareholder).

Section 1.06. Escrow Arrangements.

(a) (i) On the date of execution of the Real Estate Agreement, the Shicks shall deposit with an independent, third-party escrow agent mutually acceptable to the Shicks and VVD (the "*Escrow Agent*"), to be held and disbursed pursuant to the terms and conditions of this Agreement and an escrow agreement to be entered into among the Shicks, the Shareholders, VVD and the Escrow Agent (the "*Escrow Agreement*") a duly executed and acknowledged general warranty deed in recordable form and such other documents as shall be necessary or appropriate to convey the Real

Property to VVD (the "*Real Property Transfer Documents*"), and (ii) on the date of execution of the Escrow Agreement, each Shareholder shall deposit with the Escrow Agent to be held and disbursed pursuant to the terms and conditions of this Agreement and the Escrow Agreement certificates representing all of the Shares owned by such Shareholder, duly endorsed for transfer to VVD, or accompanied by appropriate stock powers duly endorsed in blank. By August 17, 2007, VVD shall deliver a draft of the Escrow Agreement to BDMC, the Shareholders and the Shicks. VVD, BDMC, the Shicks and the Shareholders agree to negotiate in good faith with the intention of executing a mutually agreeable Escrow Agreement within two (2) weeks after delivery by VVD of a draft of the Escrow Agreement.

(b) Subject to *Section 1.08*, on or prior to the Escrow Deposit Date, VVD shall deposit or cause to be deposited in an account (the "*Escrow Account*") with the Escrow Agent to be held and disbursed pursuant to the terms and conditions of this Agreement and the Escrow Agreement Seventy-Five Million Dollars ($75,000,000) (the "*Escrow Amount*") in the form of cash, certified funds, or an irrevocable letter of credit in favor of Escrow Agent for the benefit of BDMC, the Shicks and the Shareholders. For purposes of this Agreement, the "*Escrow Deposit Date*" shall be the 61st day following the date the HRC grants the Racing License to VVD to construct and operate a harness horse race track on the Real Property or the Alternate Site (or if such 61st day is not a Business Day, then on or prior to the first Business Day following such 61st day); provided, that, if any appeal,

remonstrance, mandamus action or other protest of any kind or nature relating to the issuance of the Racing License (each, a "*Protest*") is then pending (filed by a third party not related to and not at the request of VVD or any of its Affiliates), the Escrow Deposit Date shall be the fifth (5th) Business Day after the final, non-appealable resolution of all Protests (regardless of when commenced) in favor of VVD.

(c) If VVD fails to deposit the Escrow Amount with the Escrow Agent on or prior to the Escrow Deposit Date, or subsequently fails to make payment of the Escrow Amount as set forth in *Section 1.07* on the Closing Date (as hereinafter defined) for any reason whatsoever, including without limitation, the failure to obtain approval of any licensing body other than the HRC, (i) the Racing License granted to VVD will automatically terminate or be revoked (or, if not so provided in the Racing License, immediately abandoned by VVD) and BDMC shall have the right to proceed with the BDMC Application and consideration thereof by the HRC, and (ii) the Escrow Agent shall return to the Shicks and the Shareholders as appropriate the items deposited by them on the date of this Agreement pursuant to *Section 1.06(a)*.

(d) The Shicks and the Shareholders have agreed, jointly and severally, to indemnify, defend and hold harmless VVD and its Affiliates and representatives against any Damages (as defined herein) suffered by any of them as a result of any liabilities or claims arising out of the ownership of BDMC. The amount of cash held by the Escrow

Agent following the initial disbursement pursuant to *Section 1.07(a)* at the Closing shall serve as partial security and a first source of payment for the Shicks' and the Shareholders' indemnification obligations pursuant to *Section 8.03* during the time it is held by the Escrow Agent. The procedures for making a claim against the escrowed funds shall be set forth in the Escrow Agreement.

Section 1.07. Release of Escrowed Funds.

(a) At Closing (as defined below), upon satisfaction or waiver of all of the conditions precedent to the respective obligations of VVD, BDMC, each of the Shicks and each of the Shareholders to consummate the transaction contemplated hereunder and under the Real Estate Agreement, VVD and BDMC (or the Shareholders' Representative, as the case may be) shall jointly instruct the Escrow Agent to disburse

(i) to VVD, the Real Property Transfer Documents;

(ii) to VVD, the certificates representing the Shares, together with all accompanying stock powers, if any;

(iii) to the Shicks, 100% of the Real Property Purchase Price, if any; and

(iv) to the Shareholders' Representative, an amount equal to the Aggregate Share Purchase Price *minus* Seven Million Five Hundred Thousand Dollars ($7,500,000.00) (the "*Indemnity Deposit*"), or if the designation of the Shareholders' Representative has been revoked pursuant to *Section 1.05(b)*, to each Shareholder, an amount equal

to such Shareholder's Share Purchase Price *minus* an amount equal to the product of the Indemnity Deposit multiplied by such Shareholder's Pro Rata Share.

(b) Provided that neither BDMC, any of the Merit Group, any of the Shicks, nor any of the Shareholders have breached any covenant or obligation under this Agreement, the Real Estate Agreement or the non-compete agreements delivered pursuant to *Section 5.02(d)*, on the fifth (5th) Business Day following the earlier of (i) the date that is two (2) years after the opening by VVD at the site of the Racing License of a gaming facility pursuant to a license issued by the Pennsylvania Gaming Control Board or (ii) the date that is three (3) years after the Escrow Deposit Date, the Escrow Agent shall disburse the Indemnity Deposit (plus any income earned thereon and minus any amount paid to or reserved pursuant to the Escrow Agreement for VVD or its Affiliates or representatives in respect of any indemnity claim) to the Shareholders' Representative or, if the designation of the Shareholders' Representative has been revoked pursuant to *Section 1.05(b)*, to the Shareholders according to their respective Pro Rata Shares.

Section 1.08. Due Diligence Investigation.

(a) From the date of this Agreement until August 31, 2007, VVD and its representatives shall have the right to conduct a due diligence investigation of the Real Property and BDMC. The Shicks, BDMC and the Shareholders shall cooperate with VVD and its representatives in the

conduct of the due diligence investigation and shall provide or cause to be provided to VVD and its general partner, officers, employees, agents, consultants, accountants, legal counsel and other representatives (collectively, the "*VVD Group*"), such information and documents relating to the Real Property and/or BDMC as any of them shall reasonably request and shall allow the VVD Group or any of them, upon reasonable advance notice, to enter onto the Real Property in order to inspect the Real Property and to perform such inspections and testing on the Real Property as the VVD Group shall determine. VVD's obligation to purchase the Real Property shall be subject to VVD's satisfaction with the results of its due diligence investigation in its discretion in accordance with *Section 1.08(b)*. VVD's obligation to purchase the Shares and to deposit the Escrow Amount into the Escrow Account shall be subject to VVD determination in its reasonable discretion that there is no claim, judgment, liability, obligation, responsibility, loss, damage, cost, disbursement or expense of BDMC that is not capable of being eliminated prior to Closing; provided however, that BDMC shall have the right to eliminate, or to demonstrate to VVD's reasonable satisfaction the nonexistence of or BDMC's ability to eliminate prior to Closing, any such claim, judgment, liability, obligation, responsibility, loss, damage, cost, disbursement or expense within two (2) Business Days of notice thereof and in any event on or prior to August 31, 2007.

(b) If (i) at the conclusion of the due diligence investigation, VVD determines, in its discretion, that (A) the Real Property contains any type of

Environmental Contamination or that there has been leaching of Environmental Contamination into or from real property adjacent to the Real Property or (B) that VVD is expected to incur additional development costs in excess of Five Hundred Thousand Dollars ($500,000.00) or expected to suffer material time delays, in each case, as a result of characteristics related to the Real Property, including without limitation, soil compaction or density problems, wetlands, habitat or archeological matters or (ii) the HRC finds that the Real Property is unsuitable for construction and operation of a licensed harness horse race track and facility, then VVD may, at its sole option, request a license to construct a harness race track facility on the Alternate Site and not purchase the Real Property. The term "*Environmental Contamination*" means the presence in the soil or ground water of any of the following substances in levels or concentrations in excess of residential remediation standards or guidelines: (1) any substance that is defined as a toxic substance, hazardous substance, hazardous waste or hazardous chemical under any applicable Law, (2) polychlorinated biphenyls, asbestos or similar products, petroleum or its constituent parts, coal ash, gob piles or tailings, or (3) any other substance that is required to be remediated or reported under applicable Laws or guidelines relating to the environment.

(c) Notwithstanding any other provision of this Agreement, if VVD does not purchase the Real Property pursuant to this *Section 1.08*, then the Aggregate Share Purchase Price to be paid to the Shareholders pursuant to *Section 1.05(b)* shall be Seventy-Five Million Dollars ($75,000,000).

ARTICLE II.
REPRESENTATIONS AND WARRANTIES

Section 2.01. Representations and Warranties of the Parties. Each of the parties hereto represents and warrants to the other parties, on the date hereof and on the Closing Date that:

(a) if an entity, it is duly organized, validly existing, and in good standing and has the power and authority to own its properties and assets and to conduct its business as it is now conducted;

(b) this Agreement has been authorized by all necessary action and such party has the necessary power and authority to enter into this Agreement;

(c) this Agreement has been duly executed and delivered by such party and is enforceable against such party in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditor's rights generally or by general principles of equity; and

(d) the execution, delivery and performance of this Agreement do not require the party to obtain the consent or approval of, or to make any filing with, any Governmental Entity or any other Person except (i) the Pennsylvania Harness Racing Commission and (ii) such consents, approvals and filings, the failure to obtain or make which would not, individually or in the aggregate, have a material adverse effect on such party, the Real

Property or on the ability of such party to perform its obligations hereunder.

Section 2.02. Representations and Warranties of the Shareholders. Each Shareholder, jointly and severally, represents and warrants to VVD that, at the Closing (and prior to giving effect to the purchase and sale of the Shares, after giving effect to any disbursement instructions of Shareholders or Shareholders' Representative, as the case may be, and after receipt of the parties of full releases with respect thereto),

(a) each Shareholder will own the Shares to be sold by it beneficially and of record, free and clear of any Encumbrances of any kind;

(b) there will be no shareholder or other agreements affecting the right of any Shareholder to convey the shares to VVD or any other right of any Shareholder with respect to the Shares, and each Shareholder will have the right, authority, power and capacity to sell, assign and transfer the Shares to be sold by it to VVD;

(c) upon delivery to VVD of the certificates for or assignment of the Shares at Closing, each Shareholder will transfer valid and marketable title to the Shares, free and clear of any Encumbrance of any kind;

(d) as of the Closing, BDMC will not have and will not be subject to, any claim, judgment, liability, obligation, responsibility, loss, damage, cost, disbursement or expense of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, and BDMC's

sole assets are set forth on *Schedule 2.02* attached hereto and made a part hereof; and

(e) all Tax Returns required to be filed by, on behalf of, or that include, BDMC have been timely filed with the appropriate Governmental Entity in all jurisdictions in which such Tax Returns are required to be filed, and all such Tax Returns were true, correct and complete in all respects; all Taxes (whether or not shown on any Tax Returns) due and payable have been fully and timely paid; and BDMC has no liability for Taxes, including Taxes related to prior periods. No Governmental Entity has asserted or assessed a deficiency, claim or liability for Taxes; there is no examination or audit with respect to Taxes currently being conducted; and BDMC has not waived or agreed to an extension of any statute of limitation period with respect to an audit or examination of Taxes.

Section 2.03. Representations and Warranties of BDMC and the Shareholders. BDMC and each Shareholder, jointly and severally, represent and warrant to VVD that, at the Closing (and prior to giving effect to the purchase and sale of the Shares),

(a) BDMC is its own "ultimate parent entity" under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder (the "*HSR Act*");

(b) BDMC's "annual net sales" and "total assets" calculated pursuant to and in accordance with the HSR Act are each less than One Hundred

Nineteen Million Six Hundred Thousand Dollar [sic] ($119,600,000.00);

(c) BDMC is not "engaged in manufacturing" within the meaning of the HSR Act.

Section 2.04. Representations and Warranties of the Merit Group. Each of the Merit Group, jointly and severally, represents and warrants to VVD that, on the date hereof and at the Closing, the sole direct and indirect equity owners of Merit are TALC, LLC, Demaco Family Limited Partnership, Joseph J. Canfora, Teresa A. Canfora, one or more of the children of Joseph J. Canfora and Teresa A. Canfora as partners of the Demaco Family Limited Partnership, and/or one or more trusts for the benefit of one or more of the children of Joseph J. Canfora and Teresa A. Canfora of which Joseph J. Canfora and/or Teresa A. Canfora are the trustee(s) and which are partners of the Demaco Family Limited Partnership.

Section 2.05. Survival of Representations and Warranties. The representations and warranties contained in this *Article II* shall survive the execution, delivery and performance of this Agreement.

ARTICLE III.
PRE-CLOSING COVENANTS

Except as otherwise required or permitted hereunder, VVD, BDMC, each of the Shareholders and each of the Shicks covenant and agree to comply with each of the following provisions, as applicable to it, between the date hereof and the Closing Date, unless the

applicable party obtains the prior written waiver of the other party (which consent shall not be unreasonably withheld, conditioned or delayed).

Section 3.01. No Transfer of the Assets. BDMC, each of the Shareholders and each of the Shicks shall not, and shall not enter into any agreement, arrangement, commitment or understanding to, sell, lease, license, transfer, assign, convey, pledge or otherwise encumber, dispose of or grant any mortgage or security interest in the Shares and Real Property.

Section 3.02. Cooperation.

(a) BDMC will request, agree to and consent to the continuation of the HRC's consideration of the Amended BDMC Application until the earlier of: (i) such time that VVD fails to deposit the Escrow Amount with the Escrow Agent in accordance with the terms of this Agreement; or (ii) such time that the VVD Amended Application is either denied by the HRC or irrevocably withdrawn by VVD.

(b) BDMC, the Shareholders and the Shicks, (i) will not hinder or obstruct VVD's efforts to obtain the Racing License, and will provide information relating to the Real Property and other matters as requested by VVD and, if a Racing License is granted to VVD, assist and support VVD and the HRC to defend against any Protest and (ii) will support and assist VVD's efforts to obtain a license to operate a gaming facility issued by the Pennsylvania Gaming Control Board, to develop the Real Property and to obtain any necessary

approvals related to the Real Property from any local Governmental Entity.

Section 3.03. Governmental Approvals. Promptly after the execution of this Agreement, VVD, BDMC, the Shareholders and the Shicks shall file all applications and reports which are required to be filed by VVD, BDMC, the Shareholders and/or the Shicks with any Governmental Entity in connection with the transactions contemplated by this Agreement, including the Amended VVD Application, Amended BDMC Application, and the Stipulation. The parties shall also promptly provide all information that any Governmental Entity may require in connection with any such application or report.

ARTICLE IV.
CONDITIONS PRECEDENT TO THE CLOSING OBLIGATIONS OF BDMC, THE SHAREHOLDERS THE SHICKS AND VVD

Section 4.01. Conditions Precedent to Obligations of BDMC, the Shareholders and the Shicks. The obligations of BDMC, each of the Shareholders and each of the Shicks to consummate the transactions contemplated by this Agreement are subject to the fulfillment, at or before the Closing, of the following conditions, any one or more of which may be waived in writing by BDMC, the Shareholders and the Shicks (which waiver shall not be unreasonably withheld, conditioned or delayed):

(a) ***Deliveries by VVD.*** VVD shall have delivered to BDMC, the Shareholders and the Shicks all of the agreements, documents and other items specified in *Section 5.03* and the irrevocable deposit of the Escrow Amount as required in *Section 1.06(b)*.

(b) ***Representations and Warranties of VVD.*** All representations and warranties made by VVD (considered collectively and individually) in this Agreement shall be true and correct in all respects on and as of the Closing Date as if made by VVD on and as of that date (except for those representations and warranties which refer to facts existing at a specific date, which shall be true and correct as of such date), and BDMC, the Shareholders and the Shicks shall have received a certificate to that effect from VVD dated the Closing Date.

(c) ***Performance of the Obligations of VVD.*** VVD shall have performed, complied with or fulfilled in all material respects all of the covenants, agreements, obligations and conditions required under this Agreement and the Real Estate Agreement to be complied with or fulfilled by VVD on or before the Closing Date, and BDMC, the Shareholders and the Shicks shall have received a certificate to that effect from VVD dated the Closing Date.

(d) ***Legal Proceedings.*** None of VVD, BDMC, any of the Shareholders or any of the Shicks shall be subject to any injunction, preliminary restraining order or other similar decree of a court of competent jurisdiction prohibiting the

consummation of the transactions contemplated by this Agreement or the Real Estate Agreement. Since the date of this Agreement, there shall not have been commenced or threatened against BDMC, any of the Shareholders or any of the Shicks, any Proceeding (i) involving any challenge to, or seeking damages or other relief in connection with, any of the transactions contemplated by this Agreement or the Real Estate Agreement, or (ii) that may have the effect of preventing, delaying, making illegal, imposing limitations or conditions on or otherwise interfering with any of the transactions contemplated by this Agreement or the Real Estate Agreement.

(e) ***No Violation of Orders.*** No preliminary or permanent injunction or other order issued by any Governmental Entity of competent jurisdiction that declares this Agreement or the Real Estate Agreement invalid or unenforceable in any material respect or prevents or attempts to prevent the consummation of the transactions contemplated hereby or thereby shall be in effect.

(f) ***Required Approvals.*** All consents and approvals of any Governmental Entity, including the consent and approval of the HRC and any Person necessary to permit the consummation of the transactions contemplated by this Agreement or the Real Estate Agreement, shall have been received.

Section 4.02. Conditions Precedent to Obligations of VVD. The obligation of VVD to consummate the transactions contemplated by this Agreement is subject to the fulfillment, at or before the Closing, of

the following conditions, any one or more of which may be waived in writing by VVD (which waiver shall not be unreasonably withheld, conditioned or delayed):

(a) ***Deliveries by BDMC, the Shareholders and the Shicks.*** BDMC, the Shareholders and the Shicks shall have delivered to VVD all of the documents and items specified in *Section 5.02*. By August 31, 2007, (i) BDMC, the Shareholders and the Shicks shall have delivered to VVD a copy of the Escrow Agreement, duly executed by BDMC, the Shareholders and the Shicks, (ii) each of the Shareholders shall have delivered to the Escrow Agent certificates representing all of the Shares owned by such Shareholder, duly endorsed for transfer to VVD, or accompanied by appropriate stock powers duly endorsed in blank and (iii) provided that VVD has not elected to not purchase the Real Property, the Shicks (A) shall have delivered to VVD a copy of the Real Estate Agreement, the Guidelines (as defined herein) and the Adjacent Ground Instrument (as defined herein), each duly executed by the Shicks, and (B) shall have delivered the Real Property Transfer Documents to the Escrow Agent.

(b) ***Representations and Warranties of BDMC, the Shareholders and the Shicks.*** All representations and warranties made by BDMC, any of the Shareholders or any of the Shicks in this Agreement (considered collectively and individually) shall be true and correct in all respects on and as of the Closing Date as if made by BDMC, any of the Shareholders or any of the Shicks on and as of such date (except for those representations and warranties which refer to facts existing

at a specific date, which shall be true and correct as of such date), and VVD shall have received a certificate to that effect from BDMC, the Shareholders and the Shicks dated the Closing Date.

(c) ***Performance of the Obligations of BDMC, the Shareholders and the Shicks.*** BDMC, each of the Shareholders and each of the Shicks shall have performed, complied with or fulfilled in all respects all covenants, agreements, obligations and conditions (considered collectively and individually) required by this Agreement and the Real Estate Agreement to be performed, complied with or fulfilled by BDMC, any of the Shareholders or any of the Shicks on or before the Closing Date, and VVD shall have received a certificate to that effect from BDMC, the Shareholders and the Shicks dated the Closing Date.

(d) ***Legal Proceedings.*** None of VVD, BDMC, any of the Shareholders or any of the Shicks shall be subject to any injunction, preliminary restraining order or other similar decree of a court of competent jurisdiction prohibiting the consummation of the transactions contemplated by this Agreement or the Real Estate Agreement.

(e) ***No Violation of Orders.*** No preliminary or permanent injunction or other order issued by any Governmental Entity of competent jurisdiction which declares this Agreement or the Real Estate Agreement invalid or unenforceable in any material respect or prevents or attempts to prevent the consummation of the transactions contemplated hereby or thereby shall be in effect.

(f) ***Due Diligence.*** VVD shall have been satisfied as to its due diligence investigation of the Real Property and BDMC, all of which must be completed by August 31, 2007.

ARTICLE V.
CLOSING

Section 5.01. Closing Date. Unless VVD, BMDC, and the Shicks mutually agree otherwise, the closing of the transactions contemplated by this Agreement (the "*Closing*") shall take place at the offices of Meyer, Unkovic & Scott LLP, 1300 Oliver Building, Pittsburgh PA 15222, on the date that is sixty-one (61) days after the date the HRC grants the Racing License to VVD to construct and operate a harness horse race track on the Real Property or the Alternate Site (or if such 61st day is not a Business Day, then on or prior to the first Business Day following such 61st day); provided, that, if any Protest is then pending (filed by a third party not related to and not at the request of VVD or any of its Affiliates), the Closing shall take place on the fifth (5th) Business Day after the final, non-appealable resolution of all Protests (regardless of when commenced) in favor of VVD; and provided further that if all conditions precedent to the parties [sic] obligations to close the transactions contemplated by this Agreement and the Real Estate Agreement are not satisfied on such date, the Closing shall take place on the second (2nd) Business Day following the date upon which all such conditions are satisfied (the "*Closing Date*"). Time is of the essence, and the failure to make

the payment of the Escrow Amount at Closing pursuant to *Section 1.07*, unless otherwise agreed to in writing by the Shicks, VVD and BDMC, shall immediately result in the termination, revocation or abandonment of the Racing License granted to VVD, as set forth in *Section 1.06(c)*. The parties hereto acknowledge and agree that all proceedings to be taken and all documents to be executed and delivered by all parties at the Closing shall be deemed to have been taken and executed simultaneously, and no proceedings shall be deemed taken nor any documents executed or delivered until all have been taken, executed and delivered.

Section 5.02. Deliveries by BDMC, the Shareholders and the Shicks. At the Closing, the Shicks shall deliver exclusive possession of the Real Property to VVD, and BDMC, the Shareholders and the Shicks shall deliver (or cause to be delivered) to VVD originals or copies, if specified, of the following agreements, documents, instruments and other items:

(a) a joint written instruction to the Escrow Agent authorizing and instructing it to make the disbursements provided for in *Section 1.07*, duly executed by BDMC, the Shicks and the Shareholders;

(b) if VVD is purchasing the Real Property, a copy of the Real Estate Agreement duly executed by the Shicks if not previously delivered and all of the closing deliveries required to be delivered by the "Seller" to VVD pursuant to the Real Estate Agreement, duly executed by the Shicks;

(c) a notice signed by BDMC and to be filed with the Racing Commission immediately following the Closing, irrevocably withdrawing the BDMC Application;

(d) agreements executed by each Shareholder and by the direct and indirect owners of Merit and their respective Affiliates agreeing not to compete, without the consent of VVD, in any form of gaming or pari-mutuel racing within one hundred fifty (150) miles of VVD's harness horse race track and gaming facility for a term commencing on the Closing Date and ending on the earlier of (x) the date that is five (5) years after the opening of a gaming facility on the Racing License site, or (y) six (6) years after the Closing Date; provided however, that the foregoing shall not apply to (i) any equity interest (whether convertible or otherwise) in a bingo parlor or interest in a lottery ticket dispenser currently owned by any of the Shicks, (ii) any equity interest (whether convertible or otherwise) in a publicly traded company that comprises less than one percent (1%) of such company's outstanding equity interests, (iii) any interest of Merit, TALC, LLC or Joseph J. Canfora in a gaming or pari-mutuel racing manufacturing business or a gaming or pari-mutuel racing financing (whether by lease or otherwise) business, and (iv) any non-controlling interest of Merit in Planet Bingo;

(e) a release, duly executed by each of the Shareholders and by each of the direct and indirect owners of Merit and their respective Affiliates, releasing VVD and its Affiliates from and with respect to all claims and liabilities they or

any of them may have arising out of the litigation and administrative proceedings relating to the Racing License;

(f) a Certificate of Good Standing of BDMC issued by the Secretary of State of the Commonwealth of Pennsylvania, dated within thirty (30) calendar days of the Closing;

(g) copies of resolutions adopted by the Board of Directors of BDMC authorizing and approving the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, certified to be true, complete, correct and in full force and effect by the Secretary of BDMC;

(h) true and complete copies of the certified articles of incorporation of BDMC, including all amendments thereto, certified as true, complete and correct by the Secretary of BDMC, and a copy of the Bylaws of BDMC, including all amendments thereto, certified as true, complete and correct and in full force and effect by the Secretary of BDMC;

(i) a certificate, dated the Closing Date, duly executed by the Secretary of BDMC, the Shareholders and the Shicks certifying that the conditions set forth in *Sections 4.02(b)* and *4.02(c)* of this Agreement are satisfied as of the Closing Date; and

(j) such other documents as VVD may reasonably request for the purpose of otherwise facilitating the consummation or performance of any of the transactions contemplated by this Agreement or the Real Estate Agreement.

Section 5.03. Deliveries by VVD. Subject to fulfillment or waiver of the conditions set forth in *Section 4.02*, at the Closing, VVD shall deliver (or cause to be delivered) to BDMC, the Shareholders and the Shicks originals, or copies if specified, of the following agreements, documents and other items:

(a) a joint written instruction to the Escrow Agent authorizing and instructing it to make the disbursements provided for in *Section 1.07*, duly executed by VVD;

(b) copies of all the resolutions adopted by the General Partner of VVD authorizing and approving the execution and delivery of this Agreement and of the Real Estate Agreement and the consummation of the transactions contemplated hereby and thereby, certified to be true, complete, correct and in full force and effect by the General Partner of VVD;

(c) a Certificate of Good Standing of VVD issued by the Secretary of State of the Commonwealth of Pennsylvania, dated within thirty (30) calendar days of the Closing;

(d) a release, duly executed by VVD, releasing BDMC, the Shareholders and the direct and indirect owners of Merit from all claims and liabilities they or any of them may have arising out of the litigation and administrative proceedings relating to the Racing License;

(e) true and complete copies of the certified certificate of limited partnership of VVD, including all

amendments thereto, certified as true, complete and correct and in full force and effect by the General Partner of VVD, and a copy of the limited partnership agreement of VVD, including all amendments thereto, certified as true, complete and correct and in full force and effect by the General Partner of VVD;

(f) a certificate, dated the Closing Date, duly executed by the General Partner of VVD certifying that the conditions set forth in *Sections 4.01(b)* and *4.01(c)* of this Agreement are satisfied as of the Closing Date;

(g) if VVD is purchasing the Real Property, a copy of the Real Estate Agreement, duly executed by VVD if not previously delivered; and

(h) such other documents as BDMC may reasonably request for the purpose of otherwise facilitating the consummation or performance of any of the transactions contemplated by this Agreement or the Real Estate Agreement.

ARTICLE VI.
TERMINATION

Section 6.01. Termination. Notwithstanding anything in this Agreement to the contrary, this Agreement may be terminated at any time (a) prior to completion of the Closing by unanimous written agreement of BDMC, the Shicks and VVD or (b) by VVD on or before August 31, 2007, in the event that the condition set forth in *Section 4.02(f)* is not satisfied or VVD determines in its discretion that there is any claim,

judgment, liability, obligation, responsibility, loss, damage, cost, disbursement or expense of BDMC that is not capable of being eliminated prior to Closing; provided however, that BDMC shall have the right to eliminate, or to demonstrate to VVD's reasonable satisfaction the non-existence of or BDMC's ability to eliminate prior to Closing, any such claim, judgment, liability, obligation, responsibility, loss, damage, cost, disbursement or expense within two (2) Business Days of notice thereof and in any event on or prior to August 31, 2007.

Section 6.02. Effect of Termination. In the event this Agreement is terminated pursuant to *Section 6.01*, all rights and obligations of the parties shall terminate without any liability of a party to the other parties, BDMC may proceed with the BDMC Amended Application and VVD may proceed with the VVD Amended Application; *provided, however*, that the rights and obligations of the parties set forth in this *Section 6.02* and *Section 9.02* of this Agreement shall survive the termination of this Agreement indefinitely. If at the time that this Agreement is terminated, VVD has deposited the Escrow Amount into the Escrow Account, the Escrow Agent shall promptly return the Escrow Amount and all accrued interest thereon to VVD. In addition, if this Agreement is terminated at any time prior to VVD's deposit of the Escrow Amount into the Escrow Account, the Escrow Agent shall promptly return the Real Property Transfer Documents to the Shicks. If this Agreement is terminated for any reason, VVD shall not use or disclose any information obtained by it in the course of its due

diligence investigation pursuant to *Section 1.08* to the detriment of BDMC before the HRC or in any other proceeding relating to the issuance of the Racing License or before the Pennsylvania Gaming Control Board or in any proceeding relating to the issuance of a license issued by the Pennsylvania Gaming Control Board.

ARTICLE VII.
CERTAIN COVENANTS REGARDING REGULATORY MATTERS

BDMC, the Shareholders and the Shicks hereby voluntarily and forever waive, and hereby agree not to assert, any objection, appeal, hearing right or other right to challenge the issuance to VVD of the Racing License, so long as VVD has not breached its obligation to fund the Escrow Account, makes timely payment of the funds required by *Section 1.07(a)(iii)* and *(iv)* of this Agreement and this Agreement remains in effect.

ARTICLE VIII.
OTHER AGREEMENTS

Section 8.01. Taxes. The Shicks and VVD shall split 50%/50% and timely pay all Taxes and all recording and filing fees that may be imposed by reason of the sale, transfer, assignment or delivery by the Shicks of the Real Property hereunder or in connection with the Real Estate Agreement. Each Shareholder shall timely pay all Taxes that may be imposed by reason of

the consideration payable to such Shareholder pursuant to *Section 1.05(b)*.

Section 8.02. Development of Adjacent Ground. The Real Property is part of a larger 550-acre tract owned by the Shicks. The Shicks intend to retain the portion of the remaining acreage that does not constitute the Real Property (the "*Adjacent Ground*") for future development. The Shicks agree to develop the Adjacent Ground in a manner consistent with first class residential, retail, office or other commercial uses, including entertainment, hotel and resort facility uses and shall not permit any gaming activities to be conducted on the Adjacent Ground. In addition, VVD and the Shicks agree that except with respect to a hotel or hotels integrated into and part of the same structure with an indoor water park located on the Adjacent Ground (the "*Water Park Project*"), VVD's consent shall be required with respect to the development or rebranding of any other hotel located on the Adjacent Ground, which consent may be withheld for any rational reason, including without limitation, the potential impact to VVD's gaming, pari-mutuel racing and related operations. Prior to execution of the Real Estate Agreement, VVD and the Shicks shall mutually agree on aesthetic appearance and architectural guidelines (the "*Guidelines*") to be imposed on the Adjacent Ground (including in connection with the Water Park Project), which, among other things, shall provide that any hotel developed or operated on the Adjacent Ground will not be a budget hotel brand, including without limitation, Days Inn, Sleep Inn, Motel 6 or

Comfort Inn. The Shicks represent, warrant and covenant that they are the owners in fee simple of the Adjacent Ground, have the authority to make the agreements set forth in this *Section 8.02* and agree to document the rights and limitations contained herein in a mutually agreeable instrument (the "*Adjacent Ground Instrument*") to be executed by August 31, 2007, and placed of record with respect to the Adjacent Ground that is either superior to or will not be disturbed by any Encumbrances on the Adjacent Ground.

Section 8.03. Indemnification.

(a) For seven (7) years after the Escrow Deposit Date (the "*Indemnity Deposit Period*"), each of the Shareholders, jointly and severally, agrees to indemnify, defend and hold harmless VVD and its officers, partners employees, Affiliates, agents, attorneys and successors and assigns (collectively, the "*Indemnitees*"), from and against any and all expenses (including reasonable attorneys' fees), liabilities, losses, costs, judgments, fines, damages (including punitive damages), penalties and settlement amounts (including all interest, assessments and other charges paid in connection therewith or in respect thereof) (collectively, "*Damages*") incurred by Indemnitees or any of them resulting from, arising out of, or relating to any assets or liabilities of BDMC, the Shares of BDMC to be purchased by VVD under this Agreement or VVD's ownership of BDMC following the Closing or any breach by the Shareholders or the Shicks of any representation or warranty set forth in this Agreement or the Real Estate Agreement.

(b) Any Indemnitee who suffers or incurs any Damages shall promptly advise the Shicks as agents for the remaining Shareholders (the "*Indemnitors*") in writing of the amount of such Damages and of any claim made or threatened by any third party against any Indemnitee for which any Indemnitee would be entitled to indemnification hereunder.

(c) The Indemnitors shall undertake the defense of all proceedings for which any Indemnitee may be entitled to indemnification hereunder with counsel acceptable to such Indemnitee. Indemnitees shall have the right to elect to join in such defense with counsel of their choice at their sole expense; *provided, however*, that it shall be at the expense of the Indemnitor if (i) the Indemnitor does not undertake the defense of the proceeding within thirty (30) days after any such Indemnitee provides notice pursuant to this *Section 8.03*, (ii) in the sole reasonable judgment of any such Indemnitee, the Indemnitor fails to diligently pursue such defense, or (iii) in the sole reasonable judgment of any such Indemnitee, a conflict of interest exists between the Indemnitor and such Indemnitee.

(d) The Indemnitors shall pay to the Indemnitee in cash the amount to which the Indemnitee may become entitled by reason of the provisions of this *Section 8.03* within fifteen (15) Business Days after such amount is finally determined either by mutual agreement of the parties, or if disputed, by a court of competent jurisdiction pursuant to *Section 9.12* or, in the case of Damages arising from or relating to a Proceeding, the date on which both

such amount and Indemnitor's obligation to pay such amount have been determined by a final, non-appealable judgment of the trial court or administrative body having jurisdiction over such Proceeding. Notwithstanding the foregoing, for so long as any amounts remain in the Escrow Account, any amount to which an Indemnitee may become entitled as a result of this *Article VIII* shall be paid to such Indemnitee from amounts on deposit in the Escrow Account as provided in the Escrow Agreement.

Section 8.04. Merit Net Worth. In addition, Merit agrees to, and the Merit Partners agree to cause Merit to, maintain during the Indemnity Deposit Period and for any period thereafter in which an indemnity claim is pending, a net worth equal to a minimum of an amount equal to the product of Merit's Pro Rata Share multiplied by the Indemnity Deposit.

ARTICLE IX.
MISCELLANEOUS

Section 9.01. Public Announcements. No party to this Agreement shall make any public announcement of the transactions provided for, in, or contemplated by this Agreement or the Real Estate Agreement unless the form and substance of the announcement are mutually agreed upon by each party, which agreement shall not be unreasonably withheld, conditioned or delayed, or unless public disclosure is necessary to comply with applicable Laws.

Section 9.02. Costs and Expenses. Whether or not the transactions contemplated by this Agreement and the Real Estate Agreement are consummated, except as otherwise expressly provided herein, each of the parties shall bear all expenses and costs incurred by it in connection with this Agreement and the Real Estate Agreement and the transactions contemplated by any of them, including, without limitation, the fees and disbursements of any legal counsel, independent accountants or any other Person or representative whose services have been used by such party.

Section 9.03. Further Assurances. From and after the date of this Agreement, the parties shall cooperate reasonably with each other in connection with any steps required to be taken as part of their respective obligations under this Agreement or the Real Estate Agreement, and shall: (a) furnish upon request to each other such further information; (b) execute and deliver to each other such other documents; and (c) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of transactions contemplated by this Agreement and the Real Estate Agreement.

Section 9.04. Addresses for Notices, Etc. All notices, requests, demands and other communications that are required or may be given pursuant to the terms of this Agreement shall be in writing, and delivery shall be deemed sufficient in all respects and to have been duly given as follows: (a) on the actual date of service if delivered personally; (b) at the time of receipt of confirmation by the transmitting party if by

facsimile transmission; (c) at the time of receipt if given by electronic mail to the e-mail addresses set forth in this *Section 9.04, provided* that a party sending notice by electronic delivery shall bear the burden of authentication and of proving transmittal, receipt and time of receipt; (d) on the third day after mailing if mailed by first-class mail return receipt requested, postage prepaid and properly addressed as set forth in this *Section 9.04;* or (e) on the day after delivery to a nationally recognized overnight courier service during its business hours or the Express Mail service maintained by the United States Postal Service during its business hours for overnight delivery against receipt, and properly addressed as set forth in this Section:

If to VVD:

10 West Market Street, Suite 200
Indianapolis, Indiana 46204
Attention: Kurt Wilson
Facsimile: 317-656-8780
E-mail: kwilson@
centaurgaming.net

With a copy to (which copy shall not constitute notice hereunder):

Ice Miller LLP
One American Square, 31st Floor
Indianapolis, Indiana 46282
Attention: Stephen J. Hackman
Facsimile: 317-592-4666
E-mail: Stephen.hackman@
icemiller.com

If to BDMC, the Shareholders,
Merit, the Merit Partners
and the Shicks:

Carmen W. Shick
2959 Benjamin Franklin Parkway
Edinburg PA 16116

Facsimile: (724) 654-9397
E-mail: cwshick@aol.com

With a copy to (which
copy shall not constitute
notice hereunder):

Meyer, Unkovic & Scott LLP
1300 Oliver Building
Pittsburgh, PA 15222
Attention: Frank G. Salpietro
Facsimile: (412) 456-3293
E-mail: fgs@muslaw.com

Any party may change its address or other contact information for notice by giving notice to each other party in accordance with the terms of this *Section 9.04*. In no event will delivery to a copied Person alone constitute delivery to the party represented by such copied Person.

Section 9.05. Headings. The article, section and paragraph headings in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

Section 9.06. Construction. The parties have participated jointly in the negotiation and drafting of this Agreement and the Real Estate Agreement, and, in the event of an ambiguity or a question of intent or

a need for interpretation arises, this Agreement and the Real Estate Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement or the Real Estate Agreement.

Section 9.07. Severability. The invalidity or unenforceability of any provision of this Agreement or the Real Estate Agreement shall in no way affect the validity or enforceability of any other provision of this Agreement or the Real Estate Agreement. Wherever possible, each provision hereof shall be interpreted in such a manner as to be effective and valid under applicable Law. In case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision or provisions shall be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability, without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provisions hereof, unless such a construction would be unreasonable.

Section 9.08. Entire Agreement and Amendment. This Agreement and the Real Estate Agreement, including the Exhibits, Schedules, agreements and documents referred to and incorporated by reference herein and therein, contain the entire understanding of the parties with respect to the subject matter of this Agreement and the Real Estate Agreement. There are no representations, promises, warranties, covenants or undertakings other than those

expressly set forth in or provided for in this Agreement and the Real Estate Agreement, including the Exhibits, Schedules, agreements and documents referred to and incorporated by reference herein and therein. This Agreement and the Real Estate Agreement, including the Exhibits, Schedules, agreements and documents referred to and incorporated by reference herein and therein, supersede all prior agreements and understandings among the parties hereto with respect to the transactions contemplated by this Agreement and the Real Estate Agreement, including the Exhibits, Schedules, agreements and documents referred to and incorporated by reference herein and therein. This Agreement may not be amended, supplemented or otherwise modified except by a written agreement executed by each of the parties hereto.

Section 9.09. No Waiver; Cumulative Remedies. Except as specifically set forth herein, the rights and remedies of the parties to this Agreement are cumulative and not alternative. No failure or delay on the part of any party in exercising any right, power or remedy under this Agreement or the Real Estate Agreement will operate as a waiver of such right, power or remedy, and no single or partial exercise of any such right, power or remedy will preclude any other or further exercise of such right, power or remedy or the exercise of any other right, power or remedy. To the maximum extent permitted by applicable law: (a) no claim or right arising out of this Agreement or the Real Estate Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the

claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of that party or of the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the Real Estate Agreement.

Section 9.10. Parties in Interest. Nothing in this Agreement is intended to confer any rights or remedies under or by reason of this Agreement on any Person other than BDMC, VVD, each of the Shareholders, each of the Merit Group and each of the Shicks, and their respective heirs, successors and permitted assigns.

Section 9.11. Successors and Assigns; Assignment. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective Affiliates, heirs, successors and permitted assigns. Neither BDMC, any of the Shareholders, any of the Merit Group nor any of the Shicks shall have the right to assign or delegate his, her or its rights or duties hereunder or under the Real Estate Agreement, in whole or in part, without the prior written consent of VVD, which consent shall not be unreasonably withheld; provided however, that any such assignment or delegation shall not relieve the assigning or delegating party of any of its duties hereunder or thereunder. VVD (a) may, without any prior notice to or consent of BDMC, any of the Shareholders, any of the Merit

Group or any of the Shicks, assign or delegate, in whole or in part, its rights and duties hereunder or under the Real Estate Agreement to any Affiliate of VVD or at any time after Closing, to any Person and (b) shall have the right, prior to Closing, to assign or delegate, in whole or in part, its rights and duties hereunder or under the Real Estate Agreement with the written consent of BDMC, the Shareholders and the Shicks, which consent shall not be unreasonably withheld, conditioned or delayed. Except as expressly set forth herein, nothing in this Agreement shall confer any claim, right, interest or remedy on any Person (other than the parties hereto) or inure to the benefit of any Person (other than the parties hereto).

Section 9.12. Governing Law; Jurisdiction and Venue.

(a) ***Applicable Law.*** The Laws of the Commonwealth of Pennsylvania shall govern the creation, interpretation, construction and enforcement of and the performance under this Agreement and the Real Estate Agreement and all transactions and agreements contemplated by any of them, as well as any and all claims arising out of or relating in any way to this Agreement or the Real Estate Agreement, notwithstanding the choice of law rules of any other state or jurisdiction.

(b) ***Court Proceedings.*** Any action or Proceeding permitted by the terms of this Agreement to be filed in a court, which the action or Proceeding is brought to enforce, challenge or construe the terms or making of this Agreement or the Real Estate Agreement, and any claims arising out of

or related to this Agreement or the Real Estate Agreement, shall be exclusively brought and litigated exclusively in the Court of Common Pleas of Lawrence County or the United States District Court for the Western District of Pennsylvania. For the purpose of any action or Proceeding instituted with respect to any claim arising out of or related to this Agreement or the Real Estate Agreement, each party hereby irrevocably submits to the exclusive jurisdiction of the the [sic] Court of Common Pleas of Lawrence County or the United States District Court for the Western District of Pennsylvania. Each party hereby irrevocably waives any objection or defense which it may now or hereafter have of improper venue, forum non conveniens or lack of personal jurisdiction. Each party further irrevocably consents to the service of process out of such courts by the mailing of a copy thereof, by registered mail, postage prepaid, to the party and agrees that such service, to the fullest extent permitted by applicable laws, (i) shall be deemed in every respect effective service of process upon it in any suit, action or Proceeding arising out of or related to this Agreement or the Real Estate Agreement and (ii) shall be taken and held to be valid personal service upon and personal delivery to it. Nothing herein contained shall affect the right of each party to serve process in any other manner permitted by applicable laws.

Section 9.13. Waiver of Jury Trial. For any action or Proceeding which is permitted under this Agreement to be filed in a court, each party hereby expressly and irrevocably waives any right to a trial by jury in such action or Proceeding, including but not

limited to those actions or Proceedings to enforce or defend any rights under this Agreement or the Real Estate Agreement or under any amendment, consent, waiver, instrument, document or agreement delivered or which may in the future be delivered in connection with any of them or arising from any relationship existing in connection with this Agreement or the Real Estate Agreement. Each party agrees that in any such action or Proceeding, the matters shall be tried to a court and not to a jury.

Section 9.14. Recitals. The parties agree that the recitals to this Agreement are hereby incorporated into and made part of the body of the Agreement as if set forth in their entirety therein.

Section 9.15. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same agreement. Facsimile transmission of a counterpart hereto shall constitute an original hereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

"VVD"

VALLEY VIEW DOWNS, LP

By: CENTAUR PENNSYLVANIA, LLC
its general partner

By: /s/Roderick J. Ratcliff
Roderick J. Ratcliff, Manager

"BDMC"

BEDFORD DOWNS
MANAGEMENT CORPORATION

By: _____
Carmen W. Shick, President

"SHICKS"

_____
Carmen W. Shick

_____
Kendra A. Tabak

_____
Kenneth R. Shick III

"SHAREHOLDERS"

Carmen W. Shick

Kendra A. Tabak

Kenneth R. Shick III

* * *

RECORD AND BRIEFS

No. 16-784

FILED
JUL 13 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
LAURA UBERTI HUGHES
BRYAN CAVE LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress

QUESTION PRESENTED

Whether the safe harbor of 11 U.S.C. § 546(e) prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred.

PARTIES AND RULE 29.6 STATEMENT

Petitioner Merit Management, LP was the defendant in the district court and the appellee in the court of appeals. Petitioner has no corporate parent, and no publicly held company owns 10% or more of its partnership interests.

Respondent FTI Consulting, Inc., in its capacity as Trustee of the Centaur, LLC Litigation Trust, was the plaintiff in the district court and the appellant in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. Statutory Framework and History	4
B. Factual Background	7
C. Proceedings Below	9
SUMMARY OF ARGUMENT	11
ARGUMENT	15
I. Section 546(e) Bars a Trustee from Avoiding a Transfer Made by or to a Financial Institution, Even if the Transfer Is Not Ultimately for the Benefit of That Institution	15
A. The language "transfer by or to (or for the benefit of)" is broad, and its meaning is plain	16
B. A protective interpretation of the safe harbor is consistent with the structure and purpose of Section 546 and the Bankruptcy Code generally	20

TABLE OF CONTENTS – Continued

Page

C. A judicially imposed beneficial-interest or non-conduit requirement would render the inclusion of securities clearing agencies in the safe harbor meaningless 25

II. The Seventh Circuit's Narrow Construction of the Safe Harbor Is Misguided and Would Prove Disruptive 27

A. The safe harbor is not limited by judicial decisions construing Section 550, which identifies the parties obligated to repay an avoided transfer 27

B. A beneficial-interest requirement would produce anomalous results and introduce uncertainty into financial markets..... 34

C. The reach of Section 546(e) today is not constrained by the legislative history of an earlier version 40

D. The Seventh Circuit's concern that a broad interpretation of Section 546(e) would allow only transfers made in "cold hard cash" to be avoided does not justify denial of all protection 44

CONCLUSION 47

STATUTORY APPENDIX..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) 17, 26

In re Baker & Getty Financial Services, Inc., 974 F.2d 712 (6th Cir. 1992) 30

Baker Botts v. ASARCO, LLC, 135 S. Ct. 2158 (2015) 22

Barnhill v. Johnson, 503 U.S. 393 (1992) 19, 32

Bedford Downs Management Corp. v. State Harness Racing Commission, 926 A.2d 908 (Pa. 2007) 7

Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890 (7th Cir. 1988) 30

In re Bullion Reserve of North America, 922 F.2d 544 (9th Cir. 1991) 30

Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013) 45

Caminetti v. United States, 242 U.S. 470 (1917) 16

Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc., 454 U.S. 354 (1982) 24

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 28

CFTC v. Erskine, 512 F.3d 309 (6th Cir. 2008) 21

In re Chase & Sanborn Corp., 848 F.2d 1196 (11th Cir. 1988) 30

TABLE OF AUTHORITIES – Continued

Page

In re Coutee, 984 F.2d 138 (5th Cir. 1993).....30

CPSC v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 41

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).....24

In re E.F. Hutton Southwest Properties II, Ltd., 953 F.2d 963 (5th Cir. 1992).....36

In re Expert South Tulsa, LLC, 619 F. App'x 779 (10th Cir. 2015).....19

FCC v. NextWave Personal Communications Inc., 537 U.S. 293 (2003) 22, 25

In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 130 F.3d 52 (2d Cir. 1997).....30

In re First Security Mortgage Co., 33 F.3d 42 (10th Cir. 1994).....31

Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008).....22, 24

Hall v. United States, 132 S. Ct. 1882 (2012) ... 20, 25, 41

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).....18

Investment Co. Institute v. Camp, 401 U.S. 617 (1971).....37

Jones v. Harris Associates L.P., 559 U.S. 335 (2010).....37

In re Kipnis, 555 B.R. 877 (Bankr. S.D. Fla. 2016) 39

Law v. Siegel, 134 S. Ct. 1188 (2014) 24

TABLE OF AUTHORITIES – Continued

Page

Lewis v. City of Chicago, 560 U.S. 205 (2010) 44

LNC Investments, Inc. v. First Fidelity Bank, N.A., 173 F.3d 454 (2d Cir. 1999) 36

Loughrin v. United States, 134 S. Ct. 2384 (2014)..... 17

Maracich v. Spears, 133 S. Ct. 2191 (2013).....46

Massachusetts v. EPA, 549 U.S. 497 (2007).....41

Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).....37

Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) 22

In re MPF Holdings US LLC, 701 F.3d 449 (5th Cir. 2012) 4

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 18

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).....17

Nobelman v. American Savings Bank, 508 U.S. 324 (1993).....23, 43

Patterson v. Shumate, 504 U.S. 753 (1992)..... 16, 24, 42

Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016) 16

In re Quebecor World (USA), Inc., 719 F.3d 94 (2d Cir. 2013) 18, 38, 46

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) 17, 34

Ransom v. FIA Card Services, N.A., 562 U.S. 61 (2011).....44

TABLE OF AUTHORITIES – Continued

Page

In re Reeves, 65 F.3d 670 (8th Cir. 1995) 30

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 16

Seligson v. New York Produce Exchange, 394 F. Supp. 125 (S.D.N.Y. 1975) 31, 32

In re Southeast Hotel Properties L.P., 99 F.3d 151 (4th Cir. 1996) 30

Tannenbaum v. Zeller, 552 F.2d 402 (2d Cir. 1977) 37

Toibb v. Radloff, 501 U.S. 157 (1991) 22, 42

In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016) 33, 40

Union Bank v. Wolas, 502 U.S. 151 (1991) 20, 22, 24, 42

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 16

United States v. Williams, 553 U.S. 285 (2008) 46

Yates v. United States, 135 S. Ct. 1074 (2015) 45

STATUTORY PROVISIONS

11 U.S.C. § 101 2

11 U.S.C. § 101(22)(A) 36, 45

11 U.S.C. § 101(22)(B) 37

11 U.S.C. § 101(25)(A) 21

11 U.S.C. § 101(48) 25

11 U.S.C. § 101(53A) 35

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 101(54) 19
11 U.S.C. § 101(54)(A) 28
11 U.S.C. § 103(a) 5
11 U.S.C. § 103(d) 5
11 U.S.C. § 362(b)(2) 23
11 U.S.C. § 362(b)(4) 23
11 U.S.C. § 362(b)(14) 23
11 U.S.C. § 502(d) 28
11 U.S.C. § 523 45
11 U.S.C. § 523(a)(8) 23
11 U.S.C. § 544 ..... 2, 4, 28
11 U.S.C. § 544(b) 9, 39
11 U.S.C. § 544(b)(2) 4, 23
11 U.S.C. § 545 ..... 2, 4, 28
11 U.S.C. § 546 ..... *passim*
11 U.S.C. § 546(a) 4, 5, 22, 29
11 U.S.C. § 546(a)(1) 38
11 U.S.C. § 546(c) 5
11 U.S.C. § 546(d) 5, 22
11 U.S.C. § 546(e) ..... *passim*
11 U.S.C. § 546(f) 5, 6, 21
11 U.S.C. § 546(g) 5, 6, 21
11 U.S.C. § 546(j) 5, 6, 21

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 547 ..... 2, 4, 28
11 U.S.C. § 547(b)(1) 28
11 U.S.C. § 547(b)(3) 32
11 U.S.C. § 547(c) 23, 24
11 U.S.C. § 547(c)(7) 4
11 U.S.C. § 547(e) 28, 32
11 U.S.C. § 547(h) 23
11 U.S.C. § 548 ..... 2, 4, 9, 28
11 U.S.C. § 548(a)(1) 38
11 U.S.C. § 548(a)(1)(A) 5
11 U.S.C. § 548(a)(1)(B)(ii) 32
11 U.S.C. § 548(a)(1)(B)(ii)(I) 9
11 U.S.C. § 548(a)(2) 4, 23
11 U.S.C. § 548(c) 28
11 U.S.C. § 548(d)(1) 28, 32
11 U.S.C. § 550 ..... *passim*
11 U.S.C. § 550(a) 13, 28
11 U.S.C. § 550(a)(1) 29, 30
11 U.S.C. § 550(a)(2) 29
11 U.S.C. § 550(b) 29
11 U.S.C. § 550(e) 29
11 U.S.C. § 550(f) 29
11 U.S.C. § 551 28

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 555 23
11 U.S.C. § 556 23
11 U.S.C. § 559 23
11 U.S.C. § 560 23
11 U.S.C. § 561 23
11 U.S.C. § 741 2
11 U.S.C. § 741(7)(A)(i) 21
11 U.S.C. § 764(c) (repealed 1982) 5, 32
11 U.S.C. § 901(a) 5
11 U.S.C. § 1107(a) 4
11 U.S.C. § 1123(b)(3)(B) 4
11 U.S.C. § 1129(b)(2)(A) 17
11 U.S.C. § 1322(b)(2) 23, 43
11 U.S.C. § 1325(a)(9) 43
15 U.S.C. § 78c(a)(23)(A) 25
26 U.S.C. § 6502(a) 39
28 U.S.C. § 1254(1) 1
12 Pa. Cons. Stat. § 5105 9

TABLE OF AUTHORITIES – Continued

Page

Act of July 27, 1982, Pub. L. No. 97-222, 96 Stat. 235 5

Act of June 25, 1990, Pub. L. No. 101-311, 104 Stat. 267 6

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 6

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 5

Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, 120 Stat. 2692 ..... 6, 21

OTHER AUTHORITIES

H.R. Rep. No. 97-420 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583 40

H.R. Rep. No. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 41

H.R. Rep. No. 109-648 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585 7

Restatement (Third) of Trusts § 42 (2003) 36

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 31

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1-18) is reported at 830 F.3d 690. The memorandum opinion of the United States District Court for the Northern District of Illinois (Pet. App. 19-39) is reported at 541 B.R. 850.

JURISDICTION

The court of appeals entered judgment on July 28, 2016, and denied rehearing en banc on August 30, 2016 (Pet. App. 40). The petition was filed on December 16, 2016, within the extended deadline approved in No. 16A492, and granted on May 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 546(e) states:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity

> broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Relevant portions of Sections 101, 544, 545, 547, 548, 550, and 741 of the Bankruptcy Code are reproduced in the appendix to this brief.[1]

INTRODUCTION

This case arises from a transaction in which Petitioner and others sold securities to Respondent's predecessor in interest for $55 million. The transaction was sufficiently complex that one financial institution funded the purchase price and another, acting as escrow agent, received it. As contemplated by the sale agreement, the escrow agent held some of the proceeds for more than three years before distributing them to Petitioner. The broader transaction thus involved three transfers that implicated the Section 546(e) safe harbor in four respects: a transfer *by* the funding institution *to* the institution serving as escrow agent, and two transfers *by* the escrow agent to Petitioner.

---

[1] Unless otherwise indicated, all statutory citations in this brief are to sections within Title 11 of the United States Code, *i.e.*, the Bankruptcy Code.

Respondent, as the representative of the purchaser's bankruptcy estate, sued Petitioner to avoid and recover the payment of Petitioner's portion of the purchase price as a fraudulent transfer. The court of appeals below concluded that the purchase price was not transferred by or to a financial institution, and thus could be avoided, because the banks served as conduits between buyer and seller and had no beneficial interest in the transaction.

Respondent's effort to disregard financial institutions and to impose liability on an ultimate beneficiary of a transaction is inconsistent with the plain language of Section 546(e), which protects both transfers "by or to" financial institutions and transfers "for the benefit of" financial institutions. Respondent's position also has significant implications for entities that frequently act on behalf of others, such as securities clearing agencies, brokers, trust companies, and indenture trustees, and for the parties on whose behalf these institutions act – often in transactions several orders of magnitude larger than the middle-market stock sale involved here.

Congress has refined Section 546(e) over a period of more than 30 years, consistently expanding protection of transactions in the financial markets. The involvement of financial institutions, clearing agencies, brokers, and similar entities signifies that a transaction is sufficiently complex and significant that the parties' interests in finality should be respected. Congress elected to preclude bankruptcy trustees from

unwinding transactions in these circumstances, and its legislative judgment should be honored.

STATEMENT OF THE CASE

A. Statutory Framework and History.

Chapter 5 of the Bankruptcy Code gives a bankruptcy trustee a number of tools to attack pre-bankruptcy transactions and to collect funds for redistribution to creditors. Sections 544, 545, 547, and 548 permit a trustee to avoid transfers and obligations in particular circumstances, while Section 550 identifies the parties that may be required to return assets to the bankruptcy estate if a transfer is avoided.[2]

Each of the avoiding statutes includes constraints on a trustee's powers. For example, a trustee cannot avoid a bona fide payment of alimony as a preferential transfer, and many contributions to charitable organizations are protected from fraudulent-transfer claims. *See* §§ 544(b)(2), 547(c)(7), 548(a)(2).

Other limitations are included in Section 546 and cut across the various avoidance powers. Section 546(a) establishes a statute of limitations that normally runs two years after the bankruptcy filing. *See*

---

[2] In a typical Chapter 11 case, the debtor in possession exercises these powers. *See* § 1107(a). It is common for these claims to pass from the debtor's bankruptcy estate to a liquidating trustee or a similar successor, such as Respondent, upon confirmation of a plan of reorganization or liquidation. *See* § 1123(b)(3)(B); *In re MPF Holdings US LLC*, 701 F.3d 449, 453-54 (5th Cir. 2012).

§ 546(a). Subsections (c) and (d) protect rights of reclamation asserted by general sellers of goods, producers of grain, and United States fishermen. *See* § 546(c), (d). And subsections (e), (f), (g), and (j) preclude a trustee from avoiding transfers made by, to, or for the benefit of particular parties in connection with transactions in securities, commodities, and financial products.[3] *See* § 546(e), (f), (g), (j).

Congress added the original version of the safe harbor at issue in this case to the Bankruptcy Code in 1982.[4] It was codified as Section 546(d) and protected margin payments and settlement payments made by or to commodity brokers, forward contract merchants, stockbrokers, and securities clearing agencies. *See* Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235, 236.[5]

Two years later, Congress added financial institutions to the safe harbor and redesignated it as Section 546(e). *See* Bankruptcy Amendments and Federal

---

[3] These safe harbors do not apply to claims "under section 548(a)(1)(A)." *E.g.*, § 546(e). That section addresses transfers made "with actual intent to hinder, delay, or defraud" the debtor's creditors and is not at issue in this case. § 548(a)(1)(A).

[4] The Bankruptcy Reform Act of 1978 included a much narrower predecessor of today's Section 546(e). *See* § 764(c) (repealed 1982). Because the 1978 language was located in Subchapter IV of Chapter 7, it governed only in cases in which the debtor was a commodity broker. *See* § 103(d).

[5] This legislation repealed Section 764(c), *see id.* sec. 17(c), 96 Stat. at 240, and placed the new safe harbor in Chapter 5, where it applies in all cases under Chapters 7, 9, 11, 12, and 13. *See* §§ 103(a), 901(a).

Judgeship Act of 1984, Pub. L. No. 98-353, secs. 351, 460(d), 98 Stat. 333, 358, 377. The same legislation added Section 546(f), which provides similar protection to repo participants in connection with repurchase agreements. *See id.* sec. 393, 98 Stat. at 365.[6]

In 2005, Congress added "financial participant" to the list of parties that are protected when they make or receive margin payments or settlement payments. *See* BAPCPA sec. 907(o)(3), 119 Stat. at 182.

A 2006 amendment expanded Section 546(e) further to cover transfers made in connection with securities contracts, commodity contracts, and forward contracts. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692, 2697-98. That legislation also modified the phrase "by or to" to its current form: "by or to (*or for the benefit of*)" a financial institution or other protected party. *Id.* (emphasis added). In addition, Congress expanded the definition of "securities contract," explaining that the newly-added varieties of contracts "involve financial intermediaries – stockbrokers, financial institutions, financial participants or securities clearing agencies – that often hedge their risk on these transactions through other market transactions, repledge securities

---

[6] The other safe harbors for financial transactions were first enacted in 1990 (Section 546(g), relating to swap transactions) and 2005 (Section 546(j), relating to master netting agreements). *See* Act of June 25, 1990, Pub. L. No. 101-311, sec. 103, 104 Stat. 267, 268; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter BAPCPA), Pub. L. No. 109-8, sec. 907(e), 119 Stat. 23, 177.

collateral received under these transactions, or both." H.R. Rep. No. 109-648, at 8 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1592.

B. Factual Background.

Petitioner owned 30.007% of the stock of Bedford Downs Management Corporation, which applied in 2003 for the last available harness-racing license in Pennsylvania. Valley View Downs, L.P. filed a competing application. The two companies pursued the license, and opposed one another's applications, for more than four years. The Pennsylvania State Harness Racing Commission denied both applications in 2005, and the Supreme Court of Pennsylvania upheld those denials in 2007. *See Bedford Downs Management Corp. v. State Harness Racing Commission*, 926 A.2d 908 (Pa. 2007).

Valley View then proposed a transaction to resolve the competitors' separate efforts to obtain the license. The parties agreed to the terms of a sale to be closed following the commission's award of the license to Valley View (J.A. 96). At that time, Valley View would purchase the stock of Bedford Downs for $55 million (J.A. 77-78). Valley View also agreed to purchase the land on which Bedford Downs had planned to build its racetrack, in which Petitioner had no interest, for $20 million (J.A. 76, 78). The agreement contemplated that an escrow agent would close both sales (J.A. 79). The real-estate transaction was to be fully consummated upon closing, but $7.5 million of the purchase price for the

stock was to be held by the escrow agent for at least two years to secure certain indemnity obligations of the Bedford Downs shareholders (J.A. 82-83).

The Commission awarded a harness-racing license to Valley View later in 2007. Citizens Bank of Pennsylvania agreed to serve as escrow agent for the stock and land sales under an escrow agreement dated September 4, 2007 (J.A. 40).

The Cayman Islands branch of Credit Suisse funded the purchase price as part of an $850 million transaction that also involved other affiliates of Valley View. Credit Suisse paid the $55 million purchase price for the stock of Bedford Downs and the $20 million purchase price for the related real property to Citizens on October 30, 2007 (Dist. Ct. Dkt. No. 60-10). Petitioner and other shareholders in Bedford Downs deposited their stock certificates into escrow with Citizens as well (J.A. 27-28, 35). After the transaction closed, Citizens disbursed the former shareholders' portion of the proceeds in two installments, one in October 2007 and another after the indemnity holdback period expired in November 2010 (J.A. 23, 64, 65). In total, Petitioner received approximately $16.5 million, including interest earned during the escrow period.

Valley View's business plan was to open a "racino" – a racing facility with slot machines. But Valley View was unable to obtain the gaming license necessary for the slot-machine operation by the deadline set forth in its financing package. Valley View and an affiliate thus filed bankruptcy petitions in Delaware in October

2009. The bankruptcy court confirmed a plan of reorganization for the debtors that created a litigation trust, with Respondent as trustee. Valley View's causes of action against Petitioner and others were contributed to that trust.

C. Proceedings Below.

Respondent filed suit in the Northern District of Illinois in 2011, seeking to avoid the transfer of $16.5 million to Petitioner under Pennsylvania fraudulent-transfer law, incorporated by Section 544(b) of the Bankruptcy Code, or under the Code's own fraudulent-transfer statute, Section 548. Respondent alleged that Valley View's purchase of Petitioner's stock was avoidable as a constructive fraudulent transfer. In other words, Respondent claimed that Valley View did not receive reasonably equivalent value in exchange for its payment of $16.5 million, and Valley View was insolvent at the time of the transfer. *See* 12 Pa. Cons. Stat. § 5105; § 548(a)(1)(B)(ii)(I).

Petitioner moved for judgment on the pleadings, invoking the safe harbor of Section 546(e). The district court noted that the essential facts were undisputed, including the presence of financial institutions and either a settlement payment or a securities contract in the stock transaction (Pet. App. 20, 24). Relying on Seventh Circuit precedents that emphasized the broad text and plain meaning of Section 546(e), the district court concluded that Petitioner was entitled to the

benefit of the safe harbor and granted judgment in Petitioner's favor (Pet. App. 39).

The Seventh Circuit reversed, holding that the safe harbor does not apply when a financial institution "is neither the debtor nor the transferee but only the conduit" (Pet. App. 2). It concluded that the phrase "by or to" in Section 546(e) is ambiguous and that the more recent addition "(or for the benefit of)" is ambiguous as well (Pet. App. 5-6). The court thus turned to what it understood to be "the statute's purpose and context" (Pet. App. 6). Drawing on other provisions of the Bankruptcy Code that it believed were analogous, the court of appeals concluded that "it is the economic substance of the transaction that matters" (Pet. App. 12).

The Seventh Circuit also looked to the legislative history of the safe harbor, perceiving a fundamental goal of protecting the securities and financial markets from systemic risk (Pet. App. 13-15). Describing Valley View and Petitioner as "simply corporations that wanted to exchange money for privately held stock," the court dismissed the notion that its narrow view of Section 546(e) could produce "any potential ripple effect through the financial markets" (Pet. App. 15).

The court of appeals acknowledged that it was disagreeing with five other circuit courts (Pet. App. 16). But it concluded that "[i]f Congress had wanted to say that acting as a conduit for a transaction" involving entities that are not identified in the statute "is enough

to qualify for the safe harbor, it would have been easy to do that" (Pet. App. 18).

SUMMARY OF ARGUMENT

I. Congress has expanded the safe harbor of Section 546(e) over a period of several decades. In its current form, the statute expresses Congress's decision to provide robust protection of securities and commodities transactions involving certain types of institutions against claims by bankruptcy trustees, unless the debtor engaged in the transaction with the intent to hinder, delay, or defraud creditors. The involvement of financial institutions, stockbrokers, securities clearing agencies, and the like is an indication that a securities or commodities transaction is sufficiently large and complex that unwinding it is likely to disrupt the capital markets, the settled expectations of the parties, or both.

The plain language of Section 546(e) precludes a trustee from avoiding a transfer made "by or to (or for the benefit of)" a financial institution or any other protected party. Valley View, via Credit Suisse, transferred the purchase price to Citizens, which was then empowered to hold those funds, pay them over to Petitioner and others if certain conditions were satisfied, or return them to Valley View in other circumstances. The ultimate disposition of the funds does not change the fact that one financial institution – Credit Suisse –

transferred them to another financial institution – Citizens – which then made two further transfers to Petitioner.

Before 2006, the statute referred to transfers "by or to" financial institutions and other entities. Congress added a third possibility – "(or for the benefit of)" – in 2006. Under accepted principles of statutory interpretation, each of the three alternatives in Section 546(e) should be given a separate meaning. The Seventh Circuit's construction requires ignoring the institution identified in the statute, and renders the safe harbor ineffective, unless that institution also benefits from the transfer. It thus runs afoul of the basic rule that every word of a statute must be given effect.

A broadly protective interpretation of the safe harbor is consistent with the context and purpose of the statute as well. Chapter 5 of the Bankruptcy Code serves two fundamental purposes: a number of avoidance and recovery powers permit a trustee to recover property to augment the bankruptcy estate, but Section 546 includes several bright-line limitations on those powers. This sort of legislative balancing of interests is common in the Bankruptcy Code; fundamental debtor protections such as the automatic stay and the discharge are subject to exceptions that protect the interests of particular creditors, the financial markets, and society at large.

A plain-meaning interpretation of the statute also is necessary to make the inclusion of securities clearing agencies in the safe harbor meaningful. A

securities clearing agency is a quintessential intermediary that acts for the benefit of other parties; it does not send or receive securities-related transfers for its own benefit. If a clearing agency is disregarded for that reason – as the Seventh Circuit concluded a bank providing acquisition financing and an escrow agent should be – then the inclusion of clearing agencies in Section 546(e) serves no purpose. Well-established principles of interpretation counsel against that outcome.

II. The Seventh Circuit's approach to the safe harbor lacks a rigorous foundation and would lead to problematic outcomes. That court conflated separate concepts from two different sections of the Code: the entity that a transfer is made "to" under Section 546(e) and the "initial transferee" from which the trustee may recover under Section 550(a). Avoidance and recovery are distinct processes under the Code, and the trustee can benefit from avoidance of certain transfers without pursuing recovery from anyone. Conversely, Section 546(e) bars the trustee from avoiding a transfer at all, so that there is no need to consider who might be required to repay it. The court of appeals' reliance on Section 550 is especially problematic because the restrictive interpretation of "initial transferee" – *i.e.*, the conduit principle – was not developed by the courts until years after Congress established the safe harbor and included financial institutions within it. And because Section 550 addresses only transfer recipients, it does not determine, or even inform, whether a transfer

is made "by" a financial institution or another protected entity.

The Seventh Circuit's cramped interpretation of the safe harbor also would introduce mischief into the financial markets. Financial institutions serving in roles that might be characterized as intermediaries – common-law trustees, indenture trustees, and perhaps mutual funds – would be disregarded, or at least subject to litigation while the lower courts fleshed out the contours of the conduit rule. The largest and best-capitalized commercial banks and investment banks would be protected when trading in their own assets, but their customers – including individual investors, employee stock ownership trusts, pension funds, and others – would not. This potential liability overhang would require prudent investors to create reserves or other contingency plans after receiving funds in a securities or commodities transaction, rather than enhancing market liquidity by making new investments.

The Seventh Circuit also erred by using Congress's stated goal in enacting the original statute in 1982 to constrain the scope of the statute after it had been modified multiple times through 2006. These amendments plainly expanded the statute beyond its original formulation, such that earlier legislative history no longer describes the safe harbor fully and accurately.

The court of appeals' concern that financial institutions are involved in some fashion in nearly every securities or commodities transaction, leaving

no transfers to be avoided, is not a basis to deny coverage to financial institutions and parties with beneficial interests in transactions. The unqualified language of the safe harbor indicates that the legislature intended to sweep quite broadly, but a precise determination of the outer limit of the safe harbor is not necessary to resolve this case. A financial institution that is involved in the financing, settlement, or administration of a securities or commodities transaction is roughly comparable to the other institutions that were included in the safe harbor when financial institutions were added, such as stockbrokers and securities clearing agencies. A construction of Section 546(e) that encompasses financial institutions playing meaningful roles in these transactions adequately protects the interests and expectations of market participants and is sufficient to require reversal here.

ARGUMENT

I. Section 546(e) Bars a Trustee from Avoiding a Transfer Made by or to a Financial Institution, Even if the Transfer Is Not Ultimately for the Benefit of That Institution.

The basic facts in this case are undisputed. Credit Suisse and Citizens, which made and received the transfers at issue, are financial institutions. The transfers were either settlement payments or were made in connection with a securities contract.

Transfers of this sort are "made by or to (or for the benefit of)" a financial institution, and thus cannot be avoided, as demonstrated by the plain language of Section 546(e); its structure, history, and purpose; and fundamental canons of construction.

A. The language "transfer by or to (or for the benefit of)" is broad, and its meaning is plain.

The plain-meaning principle has long governed the Court's interpretation of the Bankruptcy Code and other statutes. When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *see also Patterson v. Shumate*, 504 U.S. 753, 758 (1992) ("applicable nonbankruptcy law" includes both state and federal law); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946-47 (2016) (treating Puerto Rico as excluded from the definition of "State" only in the single circumstance specified in the definition).

1. Section 546(e) protects a transfer made by *or* to *or* for the benefit of a financial institution or another specified entity. Congress's use of the disjunctive indicates that a transfer *by* or *to* an institution is something distinct from a transfer that is *for the benefit of* that institution. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given

separate meanings, unless the context dictates otherwise; here it does not."); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61 (1980) (construing "the broadly inclusive disjunctive phrase 'action or proceeding'" to include administrative proceedings in addition to actions in court).

The legislature's use of "or" in the safe harbor indicates that a transfer is protected even if it meets only one of the three alternatives. For example, in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, the Court concluded that a debtor pursuing confirmation of a plan over the objection of its secured creditor must satisfy only one of three options "connected by the disjunctive 'or'" in Section 1129(b)(2)(A) of the Bankruptcy Code. 132 S. Ct. 2065, 2072 (2012). A contrary interpretation would leave "by" and "to" with no independent significance: a transfer by or to an institution would not be protected unless it also were for the benefit of that institution, in which case it would be protected for the latter reason alone. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (rejecting interpretation of statute that would make one alternative "a mere subset" of another).

If Congress had intended to require a financial institution, or one of the other entities identified in Section 546(e), to have a beneficial interest in a transfer before the safe harbor is triggered, it would have been easy for the legislature to so provide. In an ordinary case, Congress's failure to pursue that course would be strong evidence that it did not intend that outcome. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct.

1652, 1659 (2017) (Congress's failure to adopt a "ready alternative . . . indicates that Congress did not in fact want" that result). But in this case, Congress did far more than merely decline to adopt more restrictive language; it amended the original formulation "by or to" in 2006 to read "by or to (or for the benefit of)."

Congress acted after the Eleventh Circuit had adopted a restrictive interpretation of the statute in *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (disregarding financial institution that "never acquired a beneficial interest in either the funds or the shares"). Congress thus made it clear that an institution's transfer or receipt of a transfer is something distinct from its beneficial interest in that transfer and that any one of these is sufficient to bring the transaction within the safe harbor. *See generally Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (explaining that one may obtain property without owning it); *In re Quebecor World (USA), Inc.*, 719 F.3d 94, 99-100 (2d Cir. 2013) ("[W]e conclude that a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both.").

The safe harbor is thus triggered if a debtor makes a transfer *to* a protected institution, or if property is transferred *by* that institution, even if the institution does not have a beneficial interest in the property transferred. The opposite is true as well: if, for some reason, Petitioner had served as escrow agent in a transaction in which Citizens had sold securities, a trustee for the purchaser would not be able to avoid the payment of the purchase price.

2. The Bankruptcy Code also includes "an expansive definition of transfer." *Barnhill v. Johnson*, 503 U.S. 393, 400 (1992). Among other things, it covers "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" property or an interest in property. § 101(54). Valley View's payment, via Credit Suisse, to Citizens of the $55 million purchase price for the stock of Bedford Downs fits easily within this definition.

After those funds were in escrow, neither Valley View nor Credit Suisse had the ability to demand that they be returned, nor to direct how or to whom Citizens paid the funds, except within the pre-established strictures of the escrow agreement.[7] Credit Suisse, on behalf of Valley View, thus disposed of or parted with the $55 million, at least on a conditional basis – *i.e.*, it transferred the funds *to* Citizens.

3. For the same reasons, the funds were not at that point transferred *to* Petitioner. When Credit Suisse and Valley View relinquished possession and control of the funds by depositing them with Citizens,

---

[7] One of the principal purposes of an escrow arrangement, of course, is to establish clear rules about the conditions that will result in the final distribution of the escrowed property to one party or the other. As it turned out, another important purpose was served in this case as well: although Valley View filed for bankruptcy protection while the $7.5 million indemnity fund remained in escrow, that money did not become part of its bankruptcy estate, and it was paid to the former shareholders as the contract contemplated. *See generally In re Expert South Tulsa, LLC*, 619 F. App'x 779, 782 (10th Cir. 2015) (discussing treatment of escrowed property in bankruptcy).

there was no certainty that any of the money would ever reach Petitioner or the other shareholders of Bedford Downs. Among other possibilities, the sale might not have closed because of the failure of a condition, or a dispute among the parties might have caused Citizens to interplead the funds. Even after the sale closed, Petitioner could have assigned its rights under the contract to another shareholder or a third party, or Valley View could have asserted a claim to the $7.5 million indemnity fund held by Citizens after the closing.

As it turned out, the conditions to closing were satisfied, and Petitioner retained its interest in the transaction. As a result, Petitioner's share of the purchase price, plus interest, eventually was transferred to Petitioner. But Citizens, a financial institution, made those transfers to Petitioner, and they also are protected by the plain language of Section 546(e).

B. A protective interpretation of the safe harbor is consistent with the structure and purpose of Section 546 and the Bankruptcy Code generally.

The plain language of Section 546(e) is consistent with its context and purpose, as well as with the Bankruptcy Code more generally. *See, e.g.*, *Hall v. United States*, 132 S. Ct. 1882, 1893 (2012) (relying on plain language, context, and structure to interpret the Code); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) (considering "sometimes conflicting policies" underlying the Code).

1. The safe harbor of Section 546(e) is one of four essentially similar provisions that preclude avoidance of transfers to participants in particular types of transactions, except for transfers motivated by actual fraudulent intent. *See* § 546(e), (f), (g), (j). Each safe harbor establishes a bright line, without regard to the dollar value of the transfer or the likely impact its avoidance would have on the parties or the broader market. Congress enacted these safe harbors in four separate bills over a period of more than 20 years. And Congress added the phrase "(or for the benefit of)" to each safe harbor in 2006. *See* Financial Netting Improvements Act of 2006, sec. 5(b), 120 Stat. at 2697-98.

Section 546(e) itself grew in scope over that period. It began as a means of protecting margin payments and settlement payments among core participants in the securities and commodities markets. In many circumstances, these parties handle funds belonging to customers or other market participants, and they might be characterized as intermediaries. Congress expanded the statute over time to encompass additional parties and transactions that do not involve the public markets at all, such as a contract to purchase a certificate of deposit or a forward contract for the delivery of coal. *See* §§ 741(7)(A)(i), 101(25)(A); *CFTC v. Erskine*, 512 F.3d 309, 324 & n.3 (6th Cir. 2008) (explaining that a forward contract is not standardized or traded on an exchange).

Other subsections of Section 546, though worded differently, perform the similar function of protecting

parties that might otherwise be subject to liability under the trustee's avoiding powers. Each also draws a bright line, without regard to the details of the claim or property involved. For instance, the statute of limitations is absolute; it does not depend on the value of the claim that is barred. *See* § 546(a). Similarly, the protections given to a United States fisherman do not require the court to evaluate the degree of harm that might befall the fisherman or the wholesale seafood market if he were not permitted to exercise his right of reclamation. *See* § 546(d).

2. The Bankruptcy Code does not have a single purpose. *See Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008); *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). Maximizing the value of the bankruptcy estate is one of the important themes underlying the Code. *See Piccadilly*, 554 U.S. at 51. There are other broad priorities as well, including providing a fresh start for the debtor, *see FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 305 n.4 (2003); giving the debtor a respite from litigation, *see generally Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 503 (1986); discouraging creditors from racing to the courthouse, *see Union Bank*, 502 U.S. at 162; and encouraging talented attorneys to practice bankruptcy law, *see Baker Botts v. ASARCO, LLC*, 135 S. Ct. 2158, 2168 (2015).

Congress has carved out many exceptions to these general bankruptcy principles. With respect to avoidance actions – which represent only one component of the trustee's estate-maximizing powers – Congress has

enacted a number of constraints. They include affirmative defenses to preference claims, *see* § 547(c), (h), protection of charitable contributions, *see* §§ 544(b)(2), 548(a)(2), several sections ensuring a creditor's right to terminate or liquidate financial arrangements, *see* §§ 555, 556, 559, 560, 561, and the safe harbors in Section 546. To the extent that it is possible to distill a single collective purpose from these provisions of the Code, it would be quite general: the trustee may recover assets for distribution to creditors, except in particular situations that Congress has declared off-limits.

Other broad bankruptcy principles are subordinated to particular congressional policy choices as well. The automatic stay is a fundamental protection that permits debtors to focus on moving forward with their financial futures rather than dealing with dunning calls and lawsuits arising from the past. But Congress has determined that some proceedings – such as a divorce case, the government's commencement of a regulatory action, or revocation of the accreditation of a school – may go forward despite the automatic stay. *See* § 362(b)(2), (4), (14). And the ultimate goal of any debtor is to align his or her future income and expenses by modifying or discharging debts. Yet Congress has legislated significant protection for student loans, which are very difficult to discharge, and home mortgages, which cannot be modified in Chapter 13. *See* §§ 523(a)(8), 1322(b)(2); *Nobelman v. American Savings Bank*, 508 U.S. 324, 327 (1993).

When this Court has considered statutory language that restricts a trustee's efforts to augment the bankruptcy estate, the statutory limitation has prevailed over the trustee's policy arguments. In *Patterson*, the Court rejected a trustee's attempt to recover the debtor's interest in an ERISA pension plan, because the clear language of the Code renders an anti-alienation provision in an ERISA plan enforceable in bankruptcy. *See Patterson*, 504 U.S. at 758-59. The Court found unpersuasive the trustee's reliance on the "policy of ensuring a broad inclusion of assets" in the estate. *See id.* at 763-64. Similarly, in *Piccadilly*, the Court rejected the debtor's argument that requiring it to pay transfer taxes on asset sales would impair the value of its estate. *See Piccadilly*, 554 U.S. at 50. And the Court interpreted Section 547(c) to protect both short-term and long-term creditors against preference claims, unpersuaded by the trustee's argument that allowing him to recover would further the policy of equal distribution. *See Union Bank*, 502 U.S. at 161-62.

By the enactment of Section 546(e) and several amendments, Congress has chosen to protect markets and the settled expectations of buyers and sellers when a securities or commodities transaction is consummated. A court cannot and should not second-guess Congress's specific choices merely because it believes that a different result would be more equitable or would advance the interests of the bankruptcy estate or its creditors. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017); *Law v. Siegel*, 134 S. Ct. 1188, 1197-98 (2014); *Central Trust Co. v. Official*

Creditors' Committee of Geiger Enterprises, Inc., 454 U.S. 354, 359-60 (1982).

C. A judicially imposed beneficial-interest or non-conduit requirement would render the inclusion of securities clearing agencies in the safe harbor meaningless.

A restrictive construction of Section 546(e) also would run afoul of the canon disfavoring an interpretation of a statute that renders a provision ineffectual or superfluous. *See NextWave*, 537 U.S. at 301; *Hall*, 132 S. Ct. at 1890.

Securities clearing agencies were included in the 1982 version of the safe harbor, even before the amendment that added financial institutions. Yet under the Seventh Circuit's approach, clearing agencies would not be protected by the safe harbor. The Bankruptcy Code defines "securities clearing agency" by reference to the Securities Exchange Act of 1934. *See* § 101(48). That statute, in turn, defines "clearing agency" as "any person who acts as an intermediary in making payments or deliveries . . . or who provides facilities for comparison of data," as well as other parties that facilitate the handling of securities or the settlement of transactions without physical delivery of securities certificates. 15 U.S.C. § 78c(a)(23)(A).

A beneficial-interest interpretation of the statute would require a securities clearing agency to be something other than what it is – an intermediary – before

the safe harbor would protect a transaction from avoidance. The statute thus would provide no protection to the clearing agency or to the ultimate recipients of funds handled by the clearing agency, and these parties would be exposed to the vagaries of court decisions on whether or not they are conduits or initial transferees. The likely result would be the very sort of disruption of the markets that the Seventh Circuit identified as Congress's principal concern when it drafted the safe harbor (Pet. App. 14-15).

The imposition of a beneficial-interest requirement would treat the inclusion of clearing agencies in the statute as "stray marks on a page – notations that Congress regrettably made but did not really intend." *Advocate*, 137 S. Ct. at 1659. By contrast, an interpretation of "by or to . . . [a] securities clearing agency" that means exactly that, without the addition of qualifications by the courts, gives effect to Congress's policy choices and its language.[8]

---

[8] Trust companies, indenture trustees, and other types of financial institutions also serve primarily or exclusively as intermediaries. Because the term "financial institution" is defined to include non-intermediary applications as well, the inclusion of that term in the safe harbor is not entirely meaningless. The implications of a restrictive interpretation for these types of institutions are discussed in Point II(B) below.

II. The Seventh Circuit's Narrow Construction of the Safe Harbor Is Misguided and Would Prove Disruptive.

The Seventh Circuit below strained to conclude that the transfers at issue were not made by or to financial institutions or, even if they were, that Congress did not intend to protect such transfers. To reach that conclusion, the court of appeals relied on case law construing Section 550 of the Bankruptcy Code narrowly, even though the courts did not develop those principles until years after Congress enacted the safe harbor. The Seventh Circuit's cramped interpretation of the statute also ill-serves Congress's goals. If it were adopted, it would produce puzzling outcomes and decrease certainty in numerous transactions in the financial markets, including significant transactions involving publicly traded securities. The court also placed undue emphasis on the legislative history of the 1980s version of the statute, when the relevant question is what the statute means after many subsequent amendments.

A. The safe harbor is not limited by judicial decisions construing Section 550, which identifies the parties obligated to repay an avoided transfer.

The Seventh Circuit developed its conduit exception to Section 546(e) by incorporating concepts from Section 550, which determines who may be required to repay a transfer that has been avoided (Pet. App. 12-13). This approach fails to respect the differences

between the language and the functions of several Code provisions.

1. The substantive avoidance statutes – Sections 544, 545, 547, and 548 – determine which transfers and obligations a trustee may avoid and identify affirmative defenses and other limitations specific to each avoidance power. These statutes focus mostly on the characteristics of the transfer that may be avoided, not the characteristics of the recipient. Section 547 sometimes refers to the "creditor," and several provisions of Sections 547 and 548 mention the "transferee," *see* §§ 547(b)(1), 547(e), 548(c), 548(d)(1), but none of these statutes discusses the "initial transferee," which is a concept specific to Section 550.

Avoidance is distinct from recovery. The trustee is not obligated to pursue recovery of a transfer, and avoidance alone may be sufficient in some situations. If the trustee's principal goal is to disallow a creditor's claim, for example, avoidance alone will do. *See* § 502(d); *Central Virginia Community College v. Katz*, 546 U.S. 356, 371 (2006). Recovery also is irrelevant if the trustee avoids a lien, which is a form of transfer. *See* § 101(54)(A). In that circumstance, the trustee obtains complete relief by avoiding the lien, which is automatically preserved for the benefit of the estate. *See* § 551. There is nothing to be recovered from any transferee.

When a trustee chooses to pursue recovery, Section 550 determines who may be liable. *See* § 550(a). Recovery from "the initial transferee" or "the entity for whose

benefit such transfer was made" is fairly straightforward. *See* § 550(a)(1). These parties are more or less strictly liable, except that they may be entitled to a lien on property to the extent that they improved it after receiving the transfer. *See* § 550(e). The trustee also may pursue recovery from a subsequent transferee, described as "any immediate or mediate transferee of such initial transferee." § 550(a)(2). But a subsequent transferee may assert a good-faith defense that is not available to the initial transferee. *See* § 550(b). Recovery also has a statute of limitations distinct from the one governing avoidance actions. *Compare* § 546(a) *with* § 550(f).

If Congress's goal had been merely to protect financial institutions and other specified entities from liability, it could have accomplished that by placing a prohibition on recovery from these parties in Section 550. If Congress had pursued that approach, financial institutions, stockbrokers, clearing agencies, and the like would have no exposure to a trustee's claims, but the customers of these institutions and others doing business with them would have potential liability. Congress instead put the safe harbor in Section 546 and precluded the trustee from avoiding the transfer in the first place. The dispositive issue is thus whether a transfer is made by, to, or for the benefit of a financial institution or another specified entity, not whether that entity would be an "initial transferee" if the trustee were permitted to avoid and recover the transfer.

2. The Seventh Circuit nevertheless conflated the concepts of "transfer . . . to" in Section 546(e) and

"initial transferee" in Section 550(a)(1). Specifically, the court of appeals concluded that Citizens would not be considered an initial transferee of the purchase price under Seventh Circuit case law. *See Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (holding that bank was not initial transferee of debtor's check because bank "acted as a financial intermediary" and "received no benefit"). The court reasoned that "transfer . . . to . . . a financial institution" must refer to a financial institution that has exposure as an initial transferee, which Citizens did not (Pet. App. 12-13). This analysis is flawed in several respects.

The first problem with this reasoning is that the conduit or intermediary construction of "initial transferee" is solely a function of case law. It is not universal, and it was not well-established when Congress enacted Section 546(e) and added financial institutions to it. The Seventh Circuit's decision in *Bonded Financial* has been influential, and many of the other circuits have adopted similar conduit principles to address the perceived inequity of imposing liability on a depository bank or another defendant that never had control of the funds transferred. *See In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1200-01 (11th Cir. 1988).[9] But the

---

[9] *See also In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57-58 (2d Cir. 1997); *In re Southeast Hotel Properties L.P.*, 99 F.3d 151, 156 (4th Cir. 1996); *In re Coutee*, 984 F.2d 138, 141 (5th Cir. 1993); *In re Baker & Getty Financial Services, Inc.*, 974 F.2d 712, 722 (6th Cir. 1992); *In re Reeves*, 65 F.3d 670, 676 (8th Cir. 1995); *In re Bullion Reserve of*

protection of conduits in some jurisdictions is uncertain, and the conduit case law is subject to revision or overruling elsewhere. Moreover, there is no reason to believe that Congress would have been confident in the early 1980s that the courts would later develop this body of case law, such that it was unnecessary for Congress to protect financial institutions in Section 546(e).

A second difficulty with the Seventh Circuit's approach is that it is essentially inconsistent with the history of the case that prompted the enactment of the safe harbor in the first place. In *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975), the trustee of a commodities broker sued the New York Produce Exchange Clearing Association to recover more than $12 million in margin payments as fraudulent transfers. *See id.* at 126-27. The Association attempted to defend on the theory that "it was a mere 'conduit' for the transmittal of margins from debit to credit members." *Id.* at 135. Its motion for summary judgment was denied for insufficient evidence. *See id.* at 136.

The 1978 version of the safe harbor was intended to overrule *Seligson*. *See* S. Rep. No. 95-989, at 106 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5892. An interpretation of Section 546(e) that postulates that Congress was comfortable that intermediaries have no legal exposure to trustees in avoidance actions fails to

---

North America, 922 F.2d 544, 549 (9th Cir. 1991); *In re First Security Mortgage Co.*, 33 F.3d 42, 44 (10th Cir. 1994). The First, Third, and District of Columbia Circuits do not have circuit-level conduit decisions.

account for Congress's singling out of *Seligson* for overruling. It also does not explain why Congress thought it necessary to include in the 1978 safe harbor parties that normally or frequently act as intermediaries, such as clearing agencies and commodity brokers. *See* § 764(c) (repealed 1982).

Third, there is the issue of when a transfer occurs. The date of a transfer is important in part because of time limitations built into the Bankruptcy Code. *See Barnhill*, 503 U.S. at 394-95. But the debtor's financial condition at the time of the transfer also is part of the trustee's prima facie case for avoidance. *See* §§ 547(b)(3), 548(a)(1)(B)(ii). The Seventh Circuit's approach raises a number of questions when an escrow agent holds funds for a period of time before disbursing them. Does the debtor's transfer occur when it sends funds to the conduit, or not until the conduit pays the initial transferee? On which date is the debtor's solvency or capitalization measured? If the transfer takes place when the debtor relinquishes its rights to the funds, as the Code suggests, *see* §§ 547(e), 548(d)(1), what is the significance of the fact that the ultimate recipient does not then have the funds? Is an ultimate beneficiary liable to repay a transfer that it never received? These questions have straightforward answers under a plain-language reading of the safe harbor. The transfer occurs when the debtor, or someone on the debtor's behalf, makes a payment to the escrow agent, but it cannot be avoided if the escrow agent is a financial institution.

The Seventh Circuit's focus on the ultimate beneficiary of a transfer also would lead to inconsistent results within a single transaction. The avoidability of a transfer, or a portion of a transfer, would depend on the identity of the investor and the manner in which it held its investment, not on the nature of the transaction generally.[10] Divergent outcomes within a single transaction or related transactions would increase market disruption rather than enhance it. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98, 121 (2d Cir. 2016) ("The broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy."), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).

Finally, the initial-transferee concept has nothing to say about who the transferor is – *i.e.*, whether the transfer is made *by* a financial institution or another

---

[10] In some transactions, the outcome would be more incoherent than inconsistent. For example, if Valley View had granted a lien to Citizens, as collateral agent for a group of lenders, to secure an obligation in connection with a securities contract, Valley View's trustee might have sued Citizens to avoid the lien as a preference or a fraudulent transfer. Citizens would not have had a Section 550 initial-transferee defense, because the trustee would not have been pursuing recovery of the transfer. (Also, Citizens would have been the *only* transferee of the lien; there would have been no other transferee for the trustee to pursue.) Would Citizens nevertheless be disregarded and the lien be partially avoided to the extent that it benefited pension funds and insurance companies that cannot take advantage of the safe harbor themselves?

protected entity. Neither Section 550 nor any other provision of the Code provides textual support for disregarding an institution that, as part of the financing or administration of a securities contract, transfers cash, securities, or other property to an ultimate beneficiary, or to another intermediary for eventual credit to the beneficiary.

The straightforward solution to these convoluted analyses is to confine Section 550 to its proper sphere: determining which parties may be required to repay an avoidable transfer. Section 546(e) addresses the antecedent question whether the transfer may be avoided at all. In some circumstances and in certain jurisdictions, the safe harbor may protect parties that also might be able to escape liability under initial-transferee principles. That overlap demonstrates that Congress and the courts have taken a comprehensive approach to the protection of participants in securities and commodities transactions, not that Congress intended in 1984 for the safe harbor to parallel the then-forthcoming case law interpreting Section 550.

B. A beneficial-interest requirement would produce anomalous results and introduce uncertainty into financial markets.

The Court stated recently that the Bankruptcy Code "standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX*, 132 S. Ct.

at 2073. Adoption of the Seventh Circuit's approach to Section 546(e) would ill-serve this goal.

1. The conduit approach to the safe harbor would introduce a disconnect between transfers that are protected and the types of transfers that, if avoided, might cause the sort of market disruption and firm failure that the Seventh Circuit perceived to be Congress's principal concern. Any transfer, no matter how small, that ultimately benefits one of the nation's largest commercial banks or investment banks would be protected. But billion-dollar transactions could be unwound to the extent that they benefit public and private pension funds, insurance companies, state and local government investment funds, and private-equity funds, all of which play critical roles in the capital markets.

The Seventh Circuit's construction also would not protect smaller market players, including individual investors, their retirement plans, investment clubs, and employee stock ownership trusts. As a general matter, investors like these are less likely than major market players to be able to absorb a loss in avoidance litigation with a bankruptcy trustee or to take legal steps that might offer greater protection. It is unlikely that Congress intended to leave smaller investors exposed while protecting major players, including the brokers who handle accounts for those smaller investors. *See* § 101(53A) (defining "stockbroker" to include both a broker trading for its own account and a broker acting on behalf of a customer).

The plain-language interpretation of the safe harbor does not suffer from these inconsistencies. To be sure, it also protects parties in some smaller transactions that could be unwound without threatening the stability of the markets. But it does so evenhandedly; if a transaction is large or complex enough that financial institutions, stockbrokers, or other entities named in the statute are involved, then the transaction is final as to both the direct and the beneficial recipients of transfers made to those institutions, absent actual fraud.

2. As discussed above, a beneficial-interest requirement would eliminate any protection for securities clearing agencies and those engaging in transactions through clearing agencies. In addition, financial institutions and their customers most likely would lose coverage in situations in which institutions act on behalf of their customers.

For example, a trust company is a financial institution under the Code. *See* § 101(22)(A). A common-law trustee holds only "a nonbeneficial interest of unlimited duration in the trust property" for the benefit of the trust beneficiaries. Restatement (Third) of Trusts § 42 (2003). Financial institutions also frequently serve as indenture trustees. *See generally In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d 963, 968 (5th Cir. 1992) (discussing responsibility of indenture trustee to protecting interests of debentureholders); *LNC Investments, Inc. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 459-60 (2d Cir. 1999) (discussing litigation by bondholders against indenture trustee). A beneficial-interest

requirement would expose trust beneficiaries and noteholders to liability for payments made by a debtor to the financial institution serving as their trustee.[11]

Determining the precise contours of the conduit principle could require years of litigation. *See generally Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1414 (2017) (noting that one difficulty with creating an exception to the Code is that it requires "defining the boundaries of the exception"). One fertile ground for litigation would be the treatment of a mutual fund, which qualifies as a financial institution when a securities contract is involved. *See* § 101(22)(B); *Investment Co. Institute v. Camp*, 401 U.S. 617, 625 n.11 (1971) ("A mutual fund is an open-end investment company."). But a mutual fund "is a 'mere shell,' a pool of assets consisting mostly of portfolio securities that belong to the individual investors holding shares in the fund." *Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir. 1977); *see also Jones v. Harris Associates L.P.*, 559 U.S. 335, 338 (2010) (adopting "pool of assets" description). If the scope of the safe harbor is determined by the economic substance of a transaction, rather than by the involvement of the parties identified by Congress, mutual

---

[11] It is possible to imagine limited circumstances in which the safe harbor protects the entities discussed here. For example, a trust company might purchase commercial paper as a short-term investment of revenues it has earned from trust services but does not yet need for operating expenses. But the safe harbor would not apply when these institutions perform their core function of acting on behalf of other parties.

funds and their beneficial owners may be exposed to liability.

The Seventh Circuit's approach creates uncertainty along another axis as well – how should a transfer involving a protected entity be treated if the beneficiary is not itself protected by the safe harbor, but unwinding the transaction nevertheless would create a "ripple effect through the financial markets" (Pet. App. 15)? As the Second Circuit has observed, "A transaction involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets." *Quebecor World*, 719 F.3d at 100. The Seventh Circuit did not identify the degree of "ripple effect" that would be sufficient to justify protecting a transaction. But even if that concept were well-understood, the difference between a transaction that merely touches the financial markets and one that would seriously impact the markets if it were undone is not normally apparent at the outset of litigation. Indeed, the ultimate beneficiaries of transfers may not even be identified until parties originally named as defendants assert third-party claims against others or respond to discovery requests.

3. If the individuals and entities discussed above are not protected by the safe harbor, the effects on the financial markets are likely to be substantial. A trustee generally can pursue avoidance of a fraudulent transfer four or more years after a transaction is consummated. *See* §§ 548(a)(1) (permitting avoidance of transfers made two years before bankruptcy), 546(a)(1)

(allowing trustee to bring suit two years after bankruptcy). The gap between an investor's receipt of a payment and its receipt of a summons may be much longer if the trustee is able to use Section 544(b) to stand in the shoes of a creditor that has a longer limitation period under applicable law, such as the Internal Revenue Service. *See, e.g.*, *In re Kipnis*, 555 B.R. 877, 879, 881-83 (Bankr. S.D. Fla. 2016) (authorizing trustee to attack 2005 transaction in 2014 bankruptcy case); 26 U.S.C. § 6502(a) (establishing 10-year limitation period for IRS).

An individual or institution that receives a payment in connection with a securities or commodities transaction has two basic choices: move forward with confidence that the transaction is final, except for the remote possibility that it was motivated by fraudulent intent, or create a reserve or some other contingency plan for a potential liability that may not arise for years.[12] Finality, and the stability that results, are great virtues in this context; they permit individuals to withdraw retirement funds for their living expenses, pension funds to pay benefits, and private-equity funds

---

[12] To the extent that an investor has an opportunity to approve or dissent from a proposed transaction – which is not always the case, legally or practically – a weak safe harbor also would distort the market. The investor would need to evaluate the potential for avoidance claims if the purchaser in the proposed transaction were to end up in bankruptcy in the future. If the investor could not justify the time and expense of that analysis, the simplest alternative might be to sell the securities on the public market, most likely at a discount to the price offered in the proposed transaction.

to reinvest proceeds into other companies. If these investors must instead prepare for the worst because of long-tailed potential liability to a bankruptcy trustee, their ability to provide capital (and, in the case of retirees, to enjoy their retirement) may be severely limited. *See Tribune*, 818 F.3d at 122 ("The need to set aside reserves to meet the costs of litigation – not to mention costs of losing – would suck money from capital markets.").

C. The reach of Section 546(e) today is not constrained by the legislative history of an earlier version.

Fundamental to the Seventh Circuit's analysis is its view that the principal goal of the safe harbor is to protect against systemic risk in the securities and commodities industries (Pet. App. 14-15). Congress described the new safe harbor in those terms in 1982. *See* H.R. Rep. No. 97-420 (1982), at 1, *reprinted in* 1982 U.S.C.C.A.N. 583 (discussing the need "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market"). But the Seventh Circuit relied on this legislative history to effectively limit the since-amended safe harbor only to claims that threaten systemic risk. That is not a tenable interpretation of the broad language at issue.

1. As discussed above, the version of the statute described in the legislative history has been amended repeatedly since 1982. The Court has often warned

about the hazards of using the statements of a later Congress to determine the intent of an earlier one. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 529-30 & n.27 (2007); *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). The Seventh Circuit's approach – using the views of an earlier Congress to delimit amendments made by a later Congress – is even more perilous.[13]

An example is instructive. In *Hall*, the debtors argued that legislative reports related to the enactment of the Bankruptcy Code in 1978 explained the appropriate treatment of taxes incurred during their Chapter 12 bankruptcy case. *See Hall*, 132 S. Ct. at 1892. The Court noted that Chapter 12 was enacted in 1986 and that the tax provisions of the Code were amended in 1980 and 2005. *See id.* at 1885, 1888. The Court thus declined to rely on the older materials "to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades." *Id.* at 1893.

2. The Seventh Circuit's approach would be problematic even if the safe harbor had not been amended since 1982. Congress's approach to the safe harbor was prophylactic, not surgical, from the beginning. The statute has always advanced the interests of

---

[13] The Seventh Circuit also cited one snippet of legislative history from the 2005 amendment (Pet. App. 14-15). But that reference to "systemic risk in the financial marketplace" appeared in the introduction to a House Report than was more than 300 pages long; it did not address the safe harbor specifically. H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

parties in the finality of transactions, not merely society's interests in avoiding a market meltdown. In 1982, a trustee could not avoid a transfer of a $100 margin payment by a customer to a stockbroker, even though the broker could easily afford to repay the $100, or a $100 million settlement payment by a broker to a customer, even though the payment rendered the broker insolvent.

Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address. The Court has remarked on this phenomenon, and resolved disputes accordingly, in several bankruptcy cases. For example, the legislative history behind a 1984 amendment to the preference statute suggested that Congress's goal was to protect creditors holding short-term obligations, but the amendment was broad enough to protect long-term creditors as well. *See Union Bank*, 502 U.S. at 157-58. The Court said that the fact that "Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Id.* at 158.

The same tension arose in *Toibb*, in which the Court was required to determine whether an individual not engaged in business could obtain relief under Chapter 11. The Court concluded that Congress expected that Chapter 11 would be used primarily by debtors engaged in business, but the plain language of the Code also permitted non-business debtors to file. *See Toibb*, 501 U.S. at 163. And in *Patterson*, the legislative history suggested that Congress intended to

exclude spendthrift trusts from the bankruptcy estate. *See Patterson*, 504 U.S. at 761-62. But Congress accomplished that goal with language broad enough to exclude ERISA-qualified plans from the estate as well, and the Court interpreted the Code accordingly. *See id.*

If Congress had intended the safe harbor to preclude only claims threatening systemic harm to the financial markets, it could have established a dollar threshold; it could have limited the statute to transfers involving publicly traded securities; or it could have instructed bankruptcy judges to evaluate the potential consequences before granting judgment to a trustee. When Congress wants to provide limited or conditional protection to creditors, it makes its intent clear. Congress took that approach in Chapter 13, precluding a debtor from modifying an automobile loan that was incurred within 910 days before the bankruptcy filing. *See* § 1325(a)(9). This statutory limit protects creditors from abusive behavior while still permitting debtors to obtain relief from older debts that, in many cases, will have been paid down and will be secured by depreciated vehicles. By contrast, a debtor cannot modify a mortgage on his or her principal residence at all, regardless of the loan balance or the length of the lending relationship. *See* § 1322(b)(2). This absolute prohibition reflects a legislative judgment that the mortgage market should be shielded from interference. *See Nobelman*, 508 U.S. at 332 (Stevens, J., concurring).

Congress's comprehensive approach to securities and commodities transactions in Section 546(e) is comparable to its treatment of home mortgages in Chapter

13. Some level of imprecision is inherent in this or any other bright-line rule, which inevitably will cover more than the kernel of the problem it addresses and, in some situations, may also be underprotective. *See Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 78 (2011). That is no basis, however, for interpreting the rule to be something other than a bright line. *See id.* The Court cannot "rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

D. The Seventh Circuit's concern that a broad interpretation of Section 546(e) would allow only transfers made in "cold hard cash" to be avoided does not justify denial of all protection.

The Seventh Circuit appeared to be concerned that a broad reading of the safe harbor would insulate nearly every securities and commodities transaction from avoidance, because of the prevalence of financial institutions in modern life. (Pet. App. 11). In particular, the court characterized Petitioner's view of Section 546(e) as "so broad as to render any transfer non-avoidable unless it were done in cold hard cash" (*Id.*). Congress's language is undeniably broad and may reach a great many securities and commodities transactions, but the Court need not locate the outer reaches of the safe harbor to resolve this case.

Credit Suisse and Citizens played active and meaningful roles in the transaction in this case. Citizens, in particular, entered into an agreement governing its rights and responsibilities; it received and held both cash and securities; and it distributed them to the appropriate parties when particular conditions had been satisfied. In this respect, Citizens provided services comparable to those performed by a commodity broker, a stockbroker, or a securities clearing agency. Neither institution simply processed a check or a wire transfer on behalf of the buyer or seller.[14]

The canon *noscitur a sociis* suggests that a transfer triggers Section 546(e), at the very least, when it involves a financial institution that plays a part or serves in a role roughly comparable to a broker or a clearing agency. *See generally Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (applying canon to § 523); *Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015) (plurality opinion) (applying canon to conclude that "record, document, or tangible object" does not include fish). Congress added financial institutions to Section 546(e) in 1984, when it already covered commodity brokers, stockbrokers, and clearing agencies, all of which play significant roles in closing and administering transactions in commodities and securities, often acting on behalf of third parties.

---

[14] A third alternative is addressed specifically in the Code. If a financial institution "is acting as agent or custodian for a customer . . . in connection with a securities contract," the customer is treated as a financial institution. § 101(22)(A).

See Quebecor World, 719 F.3d at 100 ("[T]he enumerated intermediaries are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers."); *United States v. Williams*, 553 U.S. 285, 294 (2008) (a word "is given more precise content by the neighboring words with which it is associated").

A financial institution is similar to these entities when it is actively involved with both the funds and the securities or commodities being exchanged, or when it otherwise assists in the settlement or administration of the transaction. Thus, a transfer by or to an institution that extends a credit facility designed to permit a borrower to purchase securities, or that ensures that cash and securities are secured and exchanged under agreed-upon terms, is within the safe harbor.[15]

* * *

Congress has determined that many transactions in securities and commodities should not be unwound in bankruptcy litigation. These include not only

---

[15] The Court also can reach the same conclusion by another route. A protected transfer must be made by, to, or for the benefit of a financial institution "in connection with a securities contract." § 546(e). The Court has recognized that "the phrase 'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013). If a limiting principle is needed in this case, one is readily apparent: a transfer has the requisite connection to a securities contract if a financial institution makes or receives it in the course of its responsibility for financing, closing, administering, or settling the transaction.

billion-dollar mergers and acquisitions in which the consideration flows to major banks and investment banks, but also transactions, large and smaller, that require the services of financial institutions, stockbrokers, clearing agencies, and similar entities. The court of appeals went astray by adopting a narrow view of what Congress might have been attempting to accomplish, or what Congress first set out to do several decades ago. This Court should instead give effect to the language that Congress chose to implement its policy decisions, which bars a trustee from avoiding a transfer by or to one of these institutions even if the transfer is for the ultimate benefit of someone else.

CONCLUSION

For these reasons, the judgment below should be reversed, and this case should be remanded for further proceedings.

Respectfully submitted,

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
JOHN J. SCHOEMEHL
LAURA UBERTI HUGHES
BRYAN CAVE LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

July 2017

STATUTORY APPENDIX

11 U.S.C. § 101

In this title the following definitions shall apply:

. . . .

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

. . . .

(22) The term "financial institution" means –

(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means –

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

. . . .

(26) The term "forward contract merchant" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or

in the future becomes the subject of dealing in the forward contract trade.

. . . .

(48) The term "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of section 17A.

. . . .

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

. . . .

(53A) The term "stockbroker" means person –

(A) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities –

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account.

. . . .

(54) The term "transfer" means –

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –

(i) property; or

(ii) an interest in property.

. . . .

— —

11 U.S.C. § 544

. . . .

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable

under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

— —

11 U.S.C. § 545

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien –

(1) first becomes effective against the debtor –

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

— ——

11 U.S.C. § 547

. . . .

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . . .

(e) (1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

. . . .

---

11 U.S.C. § 548

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the

debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation

to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which –

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

. . . .

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected

cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section –

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

. . . .

---

11 U.S.C. § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from –

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent

debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

. . . .

(e) (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of –

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

. . . .

(f) An action or proceeding under this section may not be commenced after the earlier of –

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

———.

11 U.S.C. § 741

In this subchapter –

. . . .

(7) "securities contract" –

(A) means –

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in section 101);

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an

option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi));

(iv) any margin loan;

(v) any extension of credit for the clearance or settlement of securities transactions;

(vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;

(vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;

(viii) any combination of the agreements or transactions referred to in this subparagraph;

(ix) any option to enter into any agreement or transaction referred to in this subparagraph;

(x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a

securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or

(xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade;

. . .

. . . .

RECORD AND BRIEFS

SUPREME COURT, U.S.
SEP 11 2017
OFFICE OF THE CLERK

No. 16-784

In the
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

WILLIAM T. REID, IV
GREGORY S. SCHWEGMANN
JOSHUA J. BRUCKERHOFF
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Highway
Building C, Suite 300
Austin, TX 78746

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondent

September 11, 2017

QUESTION PRESENTED

The Bankruptcy Code identifies a number of transfers that a trustee "may avoid" or undo. Section 546(e) of the Code, however, provides that "notwithstanding" that avoidance power, the trustee "may not avoid" a "transfer that is a ... settlement payment ... made by or to (or for the benefit of)" a half-dozen specific entities, including a "financial institution." The only transfer the trustee sought to avoid in this case was a generous payment made by one aspiring horse track owner to another horse track owner for the latter's shares. It is conceded that neither horse track is a financial institution or other entity identified in §546(e). The question presented is whether §546(e) nevertheless bars the trustee's avoidance action because the transfer in question, like virtually all transactions in today's economy, was executed through two banks.

CORPORATE DISCLOSURE STATEMENT

Respondent FTI Consulting, Inc., has no corporate parent and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
STATEMENT OF THE CASE 4
A. Statutory Background 4
1. The Trustee's Avoidance Powers 4
2. The §546(e) Exception 7
B. Factual Background 9
1. The Parties' Competition 9
2. The Parties' Settlement Agreement 10
3. The Transfer in Question 12
4. Valley View's Bankruptcy 13
C. Proceedings Below 14
1. The Trustee's Avoidance Action 14
2. The District Court Decision 15
3. The Seventh Circuit Decision 16
SUMMARY OF ARGUMENT 18
ARGUMENT 21
I. Section 546(e) Does Not Bar Avoidance Of The Relevant Transfer—Namely, The Valley-View-to-Merit Transfer That The Trustee Seeks To Avoid 21
A. The Statutory Text Demonstrates That §546(e) Applies to the Transfer the Trustee Seeks to Avoid 22

B. The Statutory Context Reinforces That §546(e) Applies to the Transfer the Trustee Seeks to Avoid, and Not the Transactions By Which That Transfer Is Executed. 31

C. The Purpose and Legislative History of §546(e) Demonstrate That Its Applicability Turns on the Transfer the Trustee Seeks To Avoid. 39

D. Section 546(e) Does Not Apply Here Because the Trustee Did Not Seek to Avoid Any Protected Transfer. 44

II. Merit's Implausible Interpretation Of §546(e) Is Meritless. 46

A. The Plain Language of §546(e) Does Not Support Merit's Interpretation. 48

B. Merit's Challenge to a "Beneficial Interest" Requirement Attacks a Straw Man. 50

C. Merit's Appeals to Statutory Purpose and History Backfire. 53

CONCLUSION 59

TABLE OF AUTHORITIES

Cases

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 27

Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,
133 S. Ct. 2107 (2013) 57

Barnhill v. Johnson,
503 U.S. 393 (1992) 5, 7, 33

Bedford Downs Mgmt. Corp. v. State Harness Racing Comm'n,
926 A.2d 908 (Pa. 2007) 9, 10

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 5, 7

Bonded Fin. Servs, Inc. v. European Am. Bank,
838 F.2d 890 (7th Cir. 1988) 37, 38, 51

Buffum v. Peter Barceloux Co.,
289 U.S. 227 (1933) 48

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 52

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 29

Comm'r v. Clark,
489 U.S. 726 (1989) 27

Cuomo v. Clearing House Ass'n, LLC,
557 U.S. 519 (2009) 28

Czyzewski v. Jevic Holding Corp.,
137 S. Ct. 973 (2017) 31, 52, 55

Dep't of Revenue of Or. v. ACF Indus., Inc.,
510 U.S. 332 (1994) 27

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 34

Fid. Fin. Servs., Inc. v. Fink,
522 U.S. 211 (1998) 8, 22, 28

Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010) 32

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 27

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 30

Hillman v. Maretta,
133 S. Ct. 1943 (2013) 29

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 27

In re Bullion Reserve of N. Am.,
922 F.2d 544 (9th Cir. 1991) 37

In re Centaur, LLC,
No. 10-10799
(Bankr. D. Del. filed Mar. 6, 2010) 14

In re Chase & Sanborn Corp.,
848 F.2d 1196 (11th Cir. 1988) 37, 51

In re Coutee,
984 F.2d 138 (5th Cir. 1993) 37

In re D.E.I. Sys., Inc.,
2011 WL 1261603
(Bankr. D. Utah Mar. 31, 2011) 25

In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 130 F.3d 52 (2d Cir. 1997) 37

In re First Sec. Mortg. Co., 33 F.3d 42 (10th Cir. 1994) 37

In re Hurtado, 342 F.3d 528 (6th Cir. 2003) 37

In re Knapper, 407 F.3d 573 (3d Cir. 2005) 7

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 51

In re Ogden, 314 F.3d 1190 (10th Cir. 2002) 37, 38

In re Railworks Corp., 760 F.3d 398 (4th Cir. 2014) 37

In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016) 56

Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846 (10th Cir. 1990) 42

Kosak v. United States, 465 U.S. 848 (1984) 28

Law v. Siegel, 134 S. Ct. 1188 (2014) 29, 54

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) 30

Maracich v. Spears, 133 S. Ct. 2191 (2013) 27

Maslenjak v. United States,
137 S. Ct. 1918 (2017) 3

Prost v. Anderson,
636 F.3d 578 (10th Cir. 2011) 32

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
132 S. Ct. 2065 (2012) 28

Seligson v. N.Y. Produce Exch.,
394 F. Supp. 125 (S.D.N.Y. 1975) 39, 40, 42

Standard Fire Ins. Co. v. Knowles,
568 U.S. 588 (2013) 48

Star Athletica, LLC v. Varsity Brands, Inc.,
137 S. Ct. 1002 (2017) 32, 48

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) 31, 32

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 29

Union Bank v. Wolas,
502 U.S. 151 (1991) 5, 7, 33

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 32

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 31

W.V. Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991) 3

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 52

Zahn v. Yucaipa Capital Fund,
218 B.R. 656 (D.R.I. 1998) 42

Statutes

11 U.S.C. §101(22A) 23, 41
11 U.S.C. §365(e) 36
11 U.S.C. §544(a) 27
11 U.S.C. §544(b)(2) 8
11 U.S.C. §545 27
11 U.S.C. §546(a)(1) 8
11 U.S.C. §546(d) 8
11 U.S.C. §546(e) ..... *passim*
11 U.S.C. §547(b) 5, 27, 33, 53
11 U.S.C. §548(a)(1) 27
11 U.S.C. §548(a)(1)(A) 5, 26, 33
11 U.S.C. §548(a)(1)(B) ..... *passim*
11 U.S.C. §548(a)(2) 8
11 U.S.C. §548(a)(2)(B) 34
11 U.S.C. §548(d)(1) 33
11 U.S.C. §548(d)(3)(A) 35
11 U.S.C. §550(a) 36
11 U.S.C. §550(b) 37
11 U.S.C. §555 36
Pub. L. No. 95-598, 92 Stat. 2549 (1978) 40
Pub. L. No. 97-222, 96 Stat. 235 (1982) 41
Pub. L. No. 109-8, 119 Stat. 177 (2005) 41
Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, 120 Stat. 2697-98 52

Other Authorities

A Racetrack by Many Names—Bedford Downs, Valley View Downs, Lawrence Downs, Elwood City Ledger (July 13, 2016), http://bit.ly/2wkrvNg 14

Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided*, 37 Bankr. L. Letter, July 2017..... *passim*

Robert E. Ginsberg et al., Ginsberg & Martin on Bankruptcy (5th ed. 2013) 4

H.R. Rep. No. 97-420 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583 ..... 41, 42

H.R. Rep. No. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 ..... 41, 55

H.R. Rep. No. 109-648 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585 52

Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725 (1984) 7

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 40

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 23

Charles Jordan Tabb, *Law of Bankruptcy* (4th ed. 2016) 4, 6

Irving E. Walker & G. David Dean, *Structuring A Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16 (2009) 57

INTRODUCTION

Several provisions in Chapter 5 of the Bankruptcy Code empower a trustee administering a debtor's estate to "avoid," or undo, certain transfers by the debtor. As relevant here, §548(a)(1)(B) of the Code empowers a trustee to avoid a "constructively fraudulent" transfer by the debtor, in which the debtor, while insolvent, did not receive "reasonably equivalent value in exchange for" the transfer. Section 546 of the Code, however, creates exceptions for certain otherwise-avoidable transfers. In particular, under §546(e), a trustee "may not avoid" a "transfer" that is a "settlement payment ... made by or to (or for the benefit of)" a financial institution or other enumerated entity.

In this case, the "transfer" that the trustee sought to avoid was a $16.5 million payment by the debtor, Valley View Downs—the aspiring owner of a "racino" (a gambler's paradise featuring both horse racing and a casino)—to petitioner Merit Management in exchange for Merit's shares in Bedford Downs, a competitor in the racino industry. It is undisputed that neither Valley View nor Merit is one of the multiple entities listed in §546(e). By its plain terms, therefore, the racino-to-racino transfer that the trustee seeks to avoid does not come within the §546(e) exception.

Nevertheless, Merit contends that the trustee's power to avoid the racino-to-racino transfer is still defeated by §546(e). Merit reaches that counterintuitive conclusion by deconstructing the racino-to-racino transfer into the component parts by which it was executed, which unsurprisingly involved

wire transfers between financial institutions, and then treating those components as the relevant "transfers" for §546(e) purposes. Through this process of deconstruction, Merit identifies not one, but three transfers by financial institutions involved in the racino-to-racino transfer. Although the trustee here (*i.e.*, the Respondent) did not seek—and, indeed, was powerless—to avoid any of those transfers (because, among other reasons, the trustee's avoidance power is limited to transfers *by the debtor*), Merit contends that the fact that the otherwise-avoidable racino-to-racino transfer was executed via wire transfers by financial institutions is enough to shield it from avoidance.

This Court should reject that contrived and impractical interpretation of §546(e). The statutory text, context, and purpose make clear that §546(e) is an exception to the trustee's avoidance power, and as such the "transfer" that the trustee "may not avoid" under §546(e) is the same transfer that the trustee seeks to avoid under the logically antecedent and textually cross-referenced avoidance powers. Here, as the parties agree, Respondent sought to avoid only the transfer *by Valley View to Merit*, neither of which, the parties further agree, is a protected entity listed in §546(e), such as a financial institution. Respondent does not seek to avoid any transfer by, to, or for the benefit of a financial institution or any other entity listed in §546(e). Accordingly, the exception to the trustee's avoidance power set forth in §546(e) does not preclude avoidance.

Merit's implausible interpretation of §546(e) has nothing to recommend it. It conflicts with the text, context, and purpose of the Code provisions at issue.

But, even more fundamentally, Merit's position conflicts with this Court's obligation to "make sense rather than nonsense out of the *corpus juris*." *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017) (quoting *W.V. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991)).

Merit would create an exception to the trustee's avoidance power that is wholly divorced from both the transfer that the trustee seeks to avoid and the problems Congress sought to address in §546(e). That broad exception would truly make nonsense of the Code. Merit would protect thousands of dubious transfers that harm innocent creditors and pose no risk whatsoever to the enumerated institutions that Congress sought to protect in §546(e). If a trustee seeks to avoid a transfer by a financial-institution debtor or to (or for the benefit of) a financial institution—all of which would be authorized by the trustee's avoidance powers in the absence of §546(e)—then the threat to the financial institution (or other protected entity) is palpable. But when the transfer at issue is a dubious transfer of substantial funds from one racino to another, §546(e) is textually inapplicable and its application would harm innocent creditors without any countervailing benefits to financial institutions and other enumerated entities (which presumably explains their non-appearance as top-side *amici*).

Chief Judge Wood's careful opinion for a unanimous Seventh Circuit panel correctly construed §546(e) as an important, but limited, exception that applies only when the transfer that the trustee seeks to avoid is made by or to (or for the benefit of) one of

the enumerated entities—which the racinos involved in this case most assuredly are not. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Statutory Background

1. The Trustee's Avoidance Powers

One of the most important tools given to a bankruptcy trustee is the power of "avoidance," which refers to the power of a bankruptcy trustee to "undo certain voluntary or involuntary transfers of the debtor's interests in property in order to bring the property back into the bankruptcy estate for distribution purposes." Robert E. Ginsberg et al., Ginsberg & Martin on Bankruptcy §8.01 (5th ed. 2013). The power attaches to transfers by the debtor of assets that properly belong to the estate, and empowers the trustee to avoid such transfers and return the assets to make them available to creditors. This power allows the trustee to reverse transfers that "interfere with" central goals of the bankruptcy system—namely, "deal[ing] with all creditors on an equitable basis" and "maximiz[ing] the value of the estate available for distribution to the entire body of creditors." Charles Jordan Tabb, *Law of Bankruptcy* §6.2 (4th ed. 2016).[1]

The trustee's avoidance powers are set forth in several provisions in Chapter 5 of the Code, each of

---

[1] Although this case involves, and this brief refers to, the avoidance power of trustees, avoidance actions may be commenced without material difference to the issues here by a trustee, debtor-in-possession, or creditors' committee. *See* Ginsberg et al., *supra*, §9.07[A].

which imposes certain requirements in order to make a transfer by the debtor one that the trustee may avoid. For example, §547 of the Bankruptcy Code authorizes a trustee to avoid a "preferential transfer," defined as "any transfer of an interest of the debtor in property" made "to or for the benefit of a creditor ... for or on account of an antecedent debt ... while the debtor was insolvent ... within 90 days before the date of the filing of the petition" that "enables [the] creditor to receive more than" the creditor would otherwise receive following bankruptcy. 11 U.S.C. §547(b); *see Barnhill v. Johnson*, 503 U.S. 393, 394 (1992); *Union Bank v. Wolas*, 502 U.S. 151, 154-55 (1991). The power conferred under §547 thus applies only to transfers by the debtor and to a creditor, and the section imposes additional requirements. This power to avoid preferential transfers "facilitate[s] the prime bankruptcy policy of equality of distribution among creditors," by ensuring that any creditor who receives "a greater payment than others of his class is required to disgorge so that all may share equally." *Union Bank*, 502 U.S. at 161.

Similarly, §548 of the Code empowers a trustee to avoid fraudulent transfers. A trustee may avoid a transfer that is "actually fraudulent," defined as a transfer "of an interest of the debtor in property ... incurred by the debtor" where "the debtor ... made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became ... indebted." 11 U.S.C. §548(a)(1)(A); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994). A trustee also has the power, exercised in this case, to avoid "constructively fraudulent transfers," *BFP*, 511 U.S. at 535, which are

transfers "of an interest of the debtor in property" where "the debtor ... received less than a reasonably equivalent value in exchange for such transfer" and, among other possibilities, "was insolvent on the date that such transfer was made ... or became insolvent as a result of such transfer," 11 U.S.C. §548(a)(1)(B)(i)-(ii)(I). The power to avoid actual and constructive fraudulent transfers protects the "rights of creditors vis-à-vis the debtor," by enabling a trustee to thwart a debtor's attempt to "place the debtor's property out of the reach of creditors and thereby hinder the efforts of creditors to get paid." Tabb, *supra*, §6.29.

Other avoidance powers similarly promote "fundamental bankruptcy policies" of equitable distribution and estate maximization. *Id.* For instance, §544 empowers a trustee to avoid transfers that would be voidable under state law and to step into the shoes of a hypothetical judicial lien creditor to avoid certain transfers or unrecorded interests to ensure fair treatment of all creditors. And §545 authorizes a trustee to avoid certain statutory liens that are detrimental to the estate.

All of these avoidance powers share a common feature in that they authorize the trustee to avoid transfers *by the debtor*. Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided*, 37 Bankr. L. Letter, July 2017, at 5-6.[2] The trustee has no power to avoid transfers made by

---

[2] This Court has relied on Professor Brubaker's scholarship in several recent bankruptcy cases. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014).

anyone other than the debtor. *Id.* Thus, this Court has recognized that avoidance under §547 applies to transfers "made by the debtor," *Barnhill*, 503 U.S. at 394, and avoidance under §548(a)(1)(B) "applies to transfers by insolvent debtors," *BFP*, 511 U.S. at 535; *see also, e.g.*, *Union Bank*, 502 U.S. at 152; *In re Knapper*, 407 F.3d 573, 583 (3d Cir. 2005) (noting that §544(b)(1) permits trustee "to avoid a transfer of property by the debtor"). The avoidance provisions reflect the concern that the debtor may have dispersed assets that properly belong to the estate (and ultimately to creditors) by transferring those assets to others with an inferior (or no) claim to the assets. *See* Brubaker, *supra*, at 5-6. The trustee is thus given the power to avoid certain transfers the debtor previously made. Those avoidance powers protect the core "advantages of bankruptcy's collective proceeding," and constitute "an integral part of the bankruptcy process." Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725, 732, 787 (1984).

2. The §546(e) Exception

The trustee's avoidance powers are not absolute. For one thing, the trustee must satisfy the statutory criteria of the particular avoidance provision invoked. A trustee seeking to avoid a transfer as constructively fraudulent, for example, must show (among other things) that "the debtor ... received less than a reasonably equivalent value" and "was insolvent on the date that such transfer was made ... or became insolvent as a result of such transfer." 11 U.S.C. §548(a)(1)(B)(i)-(ii)(I).

A party seeking to defeat a trustee's avoidance action may argue not only that a transfer does not

come within the trustee's affirmative avoidance power, but also that the transfer comes within an exception to the trustee's avoidance authority. Congress has enacted a number of exceptions or "safe harbors" that put "limits on the avoidance powers set forth elsewhere" in the Code. *Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 217 (1998). For example, §546(a) prevents the avoidance of certain otherwise-avoidable transfers after the passage of a set period of time—usually two years after the filing of a bankruptcy petition. *See* 11 U.S.C. §546(a)(1). Other provisions exempt particular kinds of transfers for policy-based reasons—for example, encouraging and protecting charitable contributions, *see id.* §§544(b)(2), 548(a)(2), or protecting farmers and fishermen in certain circumstances, *see id.* §546(d).

This case involves the exception to the trustee's avoidance power set forth in §546(e), which provides in full:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or

> securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

In short, and as relevant to this case, "[n]otwithstanding" the trustee's general power to avoid certain transfers by the debtor—such as preferential transfers (§547) or constructively fraudulent transfers (§548(a)(1)(B))—the trustee "may not avoid" a "transfer that is a ... settlement payment ... made by or to (or for the benefit of)" one of the half-dozen protected entities named in the statute: "a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency."

B. Factual Background

1. The Parties' Competition

Harness racing is a closely regulated industry in Pennsylvania. Operating a race track requires a license, and state law strictly limits the number of licenses available. *See Bedford Downs Mgmt. Corp. v. State Harness Racing Comm'n*, 926 A.2d 908, 914-15 (Pa. 2007).

In the early 2000s, only one harness racing license was available in Pennsylvania. *Id.* Two companies submitted applications to open a track in northwest Pennsylvania. JA11, 71. One applicant was Valley View Downs LP ("Valley View"), a subsidiary of the Indiana-based gaming enterprise Centaur, LLC ("Centaur"). JA10-11. The other applicant was Bedford Downs Management Corporation ("Bedford

Downs"), a private company owned in large part by members of the Shick family and Petitioner Merit Management Group LP ("Merit"), an Illinois-based gaming company. JA10. Pennsylvania subsequently passed legislation allowing horse racing facilities to offer patrons certain forms of casino gaming—authorizing a hybrid entity known as a "racino"—if the horse track obtained a gaming license separate from the racing license. *Bedford Downs*, 926 A.2d at 911. Both Valley View and Bedford Downs intended to open racinos if they could obtain the requisite racing and gaming licenses. JA12.

Neither company realized its goal. In November 2005, the Pennsylvania State Harness Racing Commission denied both parties the necessary racing license, citing concerns about the proposed site for Valley View's facility and the proposed financing for Bedford Downs. JA13, 72; *Bedford Downs*, 926 A.2d at 911-12. Both applicants appealed that administrative adjudication. In July 2007, the Pennsylvania Supreme Court affirmed the license denials, but permitted both applicants to re-apply. 926 A.2d at 910-11.

2. The Parties' Settlement Agreement

Shortly thereafter, on August 14, 2007, Valley View and Bedford Downs entered into a settlement agreement. JA70. The agreement was "made and entered into by and among" Valley View, Bedford Downs, and Bedford Downs' shareholders, which included Merit. JA70; *see also* JA113 (identifying the "[p]arties in [i]nterest" as Valley View, Bedford Downs, and Bed'ord Downs' shareholders (typeface altered)).

Under that agreement, Bedford Downs promised to withdraw from the racing license competition. JA14. In turn, Valley View committed to purchase all of Bedford Downs' stock for $55 million once Valley View received the racing license. JA70-79. Specifically, the settlement agreement provided that Valley View "shall purchase, acquire and accept from the [Bedford Downs] Shareholders, and each of the Shareholders shall sell, transfer, ... and deliver to [Valley View], all of such Shareholder's right, title and interest in and to all of the outstanding shares of capital stock of [Bedford Downs] owned by such Shareholder." JA77-78. The agreement added that "[t]he consideration to be paid by [Valley View] for the Shareholders' Shares shall be ... $55,000,000." JA78.

The settlement agreement further provided that to carry out its purchase of Bedford Downs' stock, Valley View would "deposit" the $55 million with a "third-party escrow agent" to be determined at a later point. JA78-80. Bedford Downs' shareholders would also "deposit" their stock certificates with an as-yet-unidentified escrow agent. JA80. Once Valley View obtained the racing license and satisfied the agreement's other conditions, the respective escrow agents would release the Bedford Downs stock certificates to Valley View and release $47.5 million of the $55 million purchase price to the Bedford Downs shareholders, including Merit. JA78-82. The remaining $7.5 million of the $55 million purchase price would be retained by the escrow agent for three years to cover the Bedford Downs' shareholders' agreement to indemnify Valley View for potential liabilities arising out of owning Bedford Downs. JA81-83. At the end of three years, the escrow agent would

disburse the balance to the Bedford Downs shareholders. JA83.

Several weeks after executing the settlement agreement, the parties entered into a separate escrow agreement with Citizens Bank of Pennsylvania ("Citizens Bank") to serve as the escrow agent for Valley View's payment to Bedford Downs. JA40-63. The parties also appointed Stewart Title Guaranty Company ("Stewart") to serve as the escrow agent for the stock certificates. JA26-29.

3. The Transfer in Question

The Pennsylvania Harness Racing Commission eventually awarded Valley View the state's final harness racing license. JA14. With that condition satisfied, the Bedford Downs shareholders each signed individual "stock power" directives formally "assign[ing] and transfer[ing]" their shares "to Valley View." JA31-34 (typeface altered).[3] Valley View arranged for the $55 million purchase price, which was financed by a syndicated credit financing arrangement with Credit Suisse, to be wired from Credit Suisse into Bedford Downs' account at Citizens Bank. Dist. Ct. Dkt. 60-9 at 3.

The parties then jointly directed "Citizens Bank, in its capacity as Escrow Agent" to distribute the funds per the settlement agreement and "Stewart ... in its capacity as Escrow Agent" to deliver the stock certificates. JA24-26. Valley View received the

---

[3] Unlike the other shareholder "stock power" assignments, Merit's does not include "to Valley View." JA35. This appears to be a scrivener's error, as Merit unequivocally consented to sell stock "to Valley View." JA36.

Bedford Downs stock certificates, and the Bedford Downs shareholders received the $47.5 million. JA30-31. Merit received approximately $13.7 million, corresponding to its ownership share of just over 30 percent. JA64.

A closing statement to the stock purchase reflected the "Buyer" as Valley View, the "Sellers" as the Bedford Downs shareholders (represented by Carmen Shick), and the "Purchase Price" as $55 million less the $7.5 million holdback. JA30; *see also* JA30-31 (Bedford Downs shareholders acknowledging "receipt from Valley View ... pursuant to that certain Settlement Agreement ... of $47,500,000"). JA30-31. A distribution notice likewise characterized the transaction as a "settlement to be paid to the Shareholders of [Bedford Downs] by [Valley View] for the shares of [Bedford Downs]." JA64 n.*.

Several years later, pursuant to the settlement agreement, the escrow agent disbursed the remaining $7.5 million of the purchase price to the Bedford Downs shareholders, including Merit. JA65-68. Accounting for its pro rata share of that distribution, Merit's total receipt from the sale of its shares to Valley View was about $16.5 million. *Id.*

4. Valley View's Bankruptcy

Although Valley View successfully obtained Pennsylvania's last available harness racing license, it still needed a separate gaming license to open its racino. JA14-15. And it needed that license quickly, because its broader financing package was only good for a limited time. JA17; *see also A Racetrack by Many Names—Bedford Downs, Valley View Downs,*

Lawrence Downs, Elwood City Ledger (July 13, 2016), http://bit.ly/2wkrvNg.

The Pennsylvania Gaming Control Board declined to grant the gaming license fast enough, however, and the financing package fell through. JA17. Valley View filed for Chapter 11 bankruptcy in October 2009. JA17-18. Valley View's parent corporation, Centaur, followed suit several months later. JA10-11. Their cases were consolidated in the Bankruptcy Court for the District of Delaware. *See In re Centaur, LLC*, No. 10-10799 (Bankr. D. Del. filed Mar. 6, 2010). The bankruptcy court subsequently confirmed a reorganization plan and appointed Respondent FTI Consulting, Inc., to serve as trustee of the Centaur, LLC Litigation Trust. JA9. In that capacity, Respondent was assigned authority to avoid pre-bankruptcy transfers under the avoidance provisions of the Code. JA9-10; *see* pp. 4-7, *supra*.

C. Proceedings Below

1. The Trustee's Avoidance Action

On October 27, 2011, Respondent filed suit against Merit in the Northern District of Illinois to avoid Valley View's transfer of $16.5 million to Merit as constructively fraudulent under §548(a)(1)(B) of the Code. *See* JA8 (asserting that "Valley View ... fraudulently transferred $16,503,850 to Merit Management").

Respondent alleged that the transfer by Valley View to Merit was constructively fraudulent because (1) Valley View was insolvent at the time it purchased Bedford Downs, and (2) Valley View "significantly overpaid" for Bedford Downs. JA15; *see* 11 U.S.C. §548(a)(1)(B)(ii)(I). Respondent noted that Bedford

Downs had no revenue and limited assets, and that the only conceivable value Valley View received from the purchase was removing competition for the racing license. JA15-16. Given that the racing license sold at a post-bankruptcy auction for $5.6 million—about 10% of what Valley View paid Bedford Downs—Respondent contended that Valley View "did not receive reasonably equivalent value in exchange for its $55 million transfer to the owners of Bedford Downs." JA18.[4]

Merit filed an answer raising §546(e) as an affirmative defense and then moved for judgment on the pleadings, contending that §546(e) barred the trustee from avoiding the Valley View-Merit transfer. JA2. In Merit's view, §546(e) applied because the transfer was a "settlement payment ... made by or to (or for the benefit of)" protected "financial institution[s]"—namely, Credit Suisse and Citizens Bank. 11 U.S.C. §546(e). Merit did not contend that either Valley View or Merit was a financial institution or other entity listed in §546(e).

2. The District Court Decision

The district court granted judgment to Merit. The court repeatedly identified the transfer that the trustee sought to avoid as a transfer by Valley View and "to Merit." Pet.App.20-21; *see* Pet.App.19. The district court further explained that Valley View made this allegedly avoidable transfer "*through*"—not "to"—

---

[4] The trustee also sought to avoid the transfer under §544(b), which allows a trustee to avoid transfers that are voidable under state law. *See* JA20-21 (citing the Pennsylvania Uniform Fraudulent Transfer Act). The district court and court of appeals did not directly address that claim. *See* Pet.App.22 n.1.

Credit Suisse and Citizens Bank. Pet.App.21 (emphasis added). Nevertheless, the district court found §546(e) applicable by recharacterizing the single transfer the trustee sought to avoid as multiple "transfers" between Valley View, Merit, and the banks, and reasoning that "the Transfers here were 'by or to' a financial institution because two financial institutions"—Credit Suisse and Citizens Bank—"transferred or received funds." Pet.App.35.

3. The Seventh Circuit Decision

The trustee appealed. In its briefing before the court of appeals, Merit acknowledged that Respondent sought to avoid the transfer "Valley View Downs made to Merit Management in the amount of $16,503,850." Br. of Def.-Appellee 5. Merit nevertheless argued that Respondent could not avoid the Valley-View-to-Merit transfer because the transactions by which it was executed—namely, the wiring of money by Credit Suisse to Citizens Bank, and the wiring of money by Citizens Bank to Bedford Downs—"were made by and to financial institutions." *Id.* at 1.

The Seventh Circuit unanimously rejected that argument and reversed. In an opinion by Chief Judge Wood (joined by Judges Posner and Rovner), the court of appeals held that Chapter 5 of the Code, read as a whole, "creates both a system for avoiding transfers and a safe harbor from avoidance," which "logically" should be interpreted as "two sides of the same coin." Pet.App.8. Therefore, the court explained, it "makes sense to understand" §546(e) "as applying to the *transfers that are eligible for avoidance in the first place.*" Pet.App.8 (emphasis added). Because the only transfer targeted and eligible for avoidance was the

fraudulent transfer by the debtor, Valley View, to Merit, and because it is "undisputed" that neither Valley View nor Merit is among the protected entities enumerated in §546(e), Pet.App.4, the court found §546(e) inapplicable, Pet.App.18. In other words, §546(e) does not bar "transfers that are simply conducted *through* financial institutions (or the other entities named in §546(e)), where the entity is neither the debtor nor the transferee but only the conduit." Pet.App.2.

The Seventh Circuit explained that Merit's interpretation of §546(e) creates inconsistencies with other Code provisions and immunizes a wide swath of transfers in ways Congress never envisioned. Pet.App.15-17. In fact, Merit was forced to concede at oral argument that avoiding the Valley-View-to-Merit transfer would cause "absolutely no harm" to Citizens Bank, Credit Suisse, or any other entity enumerated in §546(e). Oral Arg. Rec. at 25:09-30. Merit nevertheless argued that Congress intended §546(e) to protect "investors generally." *Id.* at 13:47-52. The Seventh Circuit, however, took a different view. It noted that the trustee's avoidance powers provided necessary "protections for creditors," and it declined to undermine those protections by "interpret[ing] the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." Pet.App.16. As the court concluded, "[i]f Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not." Pet.App.18.

SUMMARY OF ARGUMENT

The text, context, and purpose of §546(e) all support an interpretation where the relevant "transfer" that must be "by or to (or for the benefit of)" a financial institution is the transfer that the trustee seeks to avoid, not the component transactions by which that transfer is executed.

Section 546(e) includes multiple textual indications that the relevant transfer is the transfer by the debtor that the trustee seeks to avoid, and not its component subparts. First, as the provision's first word "[n]otwithstanding" makes clear, §546(e) is written as an exception to the avoidance power granted to the trustee in other provisions of the Code. There is no question that when judging the applicability of the avoidance power the trustee invokes, the relevant transfer is the one the trustee seeks to avoid. There is no logical reason a different transfer (let alone a transfer by a non-debtor that the the trustee could never reach) would be the focus of whether the exception applies. That reading is strongly reinforced by the fact that §546(e) is written as a limitation on the trustee's powers and addresses not "transactions" that are wholly immune from avoidance, but "transfer[s]" that "the trustee may not avoid." Since the trustee can only avoid transfers by the debtor, it would be more than passing strange if §546(e) applied because of a transaction by a non-debtor financial institution (like Credit Suisse or Citizens Bank here). Moreover, the text asks whether the transfer itself "is" one that may not be avoided, not whether it "involves" or "includes" transactions that may not be avoided. Finally, §546(e) carefully

enumerates six separate active participants in the securities markets that could initiate or receive a settlement payment that a trustee could seek to avoid. Given the ubiquity of financial institutions in making wire transfers to execute settlement payments, that careful enumeration would be for naught if the mere presence of any wire transfer were enough to trigger §546(e). If Congress really wanted to exempt all settlement payments or all settlement payments processed by a financial institution, it would have said so and dispensed with the careful enumeration of protected entities in §546(e).

Multiple canons of statutory construction—from the principle that like terms are given like meanings, to rules favoring narrow constructions of exceptions and disfavoring superfluity, to the notion that statutes protect those in the statutory zone of interest—reinforce that the relevant transfer for determining the applicability of §546(e) is the transfer the trustee has targeted for avoidance, and not the transactions by which that challenged transfer is executed. Surrounding statutory context and provisions are to the same effect.

That reading also comports with the legislative history and purpose of §546(e) and eschews a reading that would harm countless innocent creditors with no countervailing benefit to the institutions §546(e) was designed to protect. Congress enacted what is now §546(e) to abrogate a district court decision that permitted a trustee's avoidance action on behalf of a commodity broker-debtor against a clearinghouse-defendant to go forward. Over the years, Congress added other institutions central to the financial

markets, including "financial institutions," in an effort to prevent systemic risk to those markets. Applying the exception to prevent a trustee from seeking to avoid a transfer by a financial-institution debtor or to or for the benefit of such institutions vindicates the statutory purposes. But applying §546(e) to bar avoidance of a transfer between non-enumerated entities, based on the inconsequential and all-but-inevitable detail that the transfer was executed via a financial institution, needlessly hurts creditors while doing nothing to protect the markets against systemic risk.

In short, the avoidance-authorizing provisions and the exception in §546(e) fit together as a coherent whole. If the transfer that the trustee seeks to avoid is "by or to (or for the benefit of)" a financial institution or other entity enumerated in §546(e), the exception bars avoidance. Otherwise, the trustee may proceed. That straightforward rule resolves this case. It is undisputed that the only transfer the trustee sought to avoid was the transfer by the debtor Valley View to Merit. And it is undisputed that neither Valley View nor Merit is an entity enumerated in §546(e), such as a financial institution. Section 546(e) therefore does not apply.

Merit's contrary interpretation, where §546(e) applies to every margin payment, settlement payment, or securities contract executed through a bank, has nothing to recommend it. Merit's view exalts form over substance. Both the avoidance powers for fraudulent transfers and the exception for certain core players in the securities markets are driven by concerns about the substance of where the

money went, not the details of how it got there. Merit seeks to attribute sweeping consequences to a technical addition to the statute, and can offer no coherent explanation for why Congress would want to harm innocent creditors under circumstances where there is concededly zero risk either to the six protected entities enumerated in the statute or to the broader securities markets.

ARGUMENT

I. Section 546(e) Does Not Bar Avoidance Of The Relevant Transfer—Namely, The Valley-View-to-Merit Transfer That The Trustee Seeks To Avoid.

The statutory construction issue at the heart of this case turns less on a dispute about what some term in the statutory text means and more on which transfer the statute applies to. All agree that the transfer that the trustee seeks to avoid was a settlement payment by one racino to another racino, neither of which is a financial institution. Thus, if the relevant transfer for judging the applicability of §546(e) is the racino-to-racino transfer that the trustee sought to avoid, then §546(e) is inapplicable by its plain terms and the trustee should prevail. The parties likewise agree that the racino-to-racino transfer here, like virtually every other settlement payment, was executed via transactions between financial institutions, rather than by passing a bag of cash. Thus, if the relevant transfers for judging the applicability of §546(e) are the component transactions by which the racino-to-racino transfer was executed, then §546(e) is applicable by its plain terms and Merit should prevail.

The text, context, and purpose of §546(e) provide a clear answer and demonstrate that its applicability is properly judged by reference to the transfer by the debtor that the trustee seeks to avoid, not by reference to the component transactions by non-debtor financial institutions involved in that transfer's execution. Or, as the Seventh Circuit put it, §546(e) applies "to the transfers that are eligible for avoidance in the first place," not to transactions by non-debtors that the trustee could never avoid. Pet.App.8. Since the only transfer that the trustee sought to avoid—and the only transfer "eligible for avoidance in the first place"—was the transfer of $16.5 million by the debtor, Valley View, to Merit, §546(e) is inapplicable here.

A. The Statutory Text Demonstrates That §546(e) Applies to the Transfer the Trustee Seeks to Avoid.

1. Multiple textual features of §546(e) together indicate that it operates as an exception or defense that renders a transfer otherwise within the trustee's avoidance power immune from avoidance. And consistent with that understanding of §546(e)'s role in the statute, the "transfer" that must satisfy the terms of §546(e) is the transfer by the debtor that the trustee seeks to avoid, not the component transactions by which the challenged transfer was executed.

From its very first word—"[n]otwithstanding"—§546(e) makes clear that it operates as an exception to the trustee powers granted elsewhere in the Code. As used in §546(e), "notwithstanding" is a word that indicates that what follows is a specific exception that "puts certain limits" on a more general rule "set forth elsewhere" in the statute. *Fink*, 522 U.S. at 217; *see*

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers."). And §546(e) leaves no doubt about which general rules it provides an exception to or where those general rules are set forth. Section 546(e) exempts certain transfers, "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b)." Those provisions all grant the trustee the power to avoid certain transfers by the debtor and the discretion to pick which transfers to avoid. To be sure, the transfer identified must satisfy the terms of the avoidance provision the trustee invokes. Thus, it must be a transfer by the debtor, *see* pp. 6-7, *supra*, and, as relevant here, must be constructively fraudulent under the requirements of §548(a)(1)(B). Merit is, of course, free to argue that the Valley-View-to-Merit transfer the trustee seeks to avoid does not satisfy the terms of §548(a)(1)(B).

But "[n]otwithstanding" that a transfer satisfies the terms of §548(a)(1)(B), or "sections 544, 545, 547, ... [or] 548(b)," "the trustee" still "may not avoid a transfer" if it "is" a transfer with certain characteristics. 11 U.S.C. §546(e). In determining whether a transfer has those characteristics, there is every reason to analyze the transfer that the trustee seeks to avoid, and not the component transactions by which that transfer is executed, which will typically be made by non-debtors and thus beyond the trustee's avoidance power in the first place. Here, for example, Merit would have §546(e) apply because the Valley-View-to-Merit transfer was executed via, *inter alia*, a wire transfer by Credit Suisse to Citizens Bank. The

trustee could never avoid that transaction. Credit Suisse is not the debtor, and the relevant avoidance provisions—"sections 544, 545, 547, 548(a)(1)(B), and 548(b)"—authorize only the avoidance of transfers *by the debtor*. When Congress provided that "notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b)" a trustee "may not avoid a transfer" with specified characteristics, it was plainly talking about a transfer by the debtor that the trustee could otherwise avoid—not a component transaction by a non-debtor that the trustee could never avoid.

Merit would deconstruct the Valley-View-to-Merit transfer that the trustee seeks to avoid into multiple component transactions, but the text of §546(e) refers not to "transactions" but to "a transfer," and asks not whether that transfer "involves" or "includes" transactions with certain characteristics but whether the transfer "is" one by, to, or for the benefit of certain protected entities. By asking what the transfer "is," not what it "involves," the statute looks to the substance of a single transfer, not to the details of its execution or to multiple component transactions.

The textual indications do not stop there. The title of §546, "[l]imitations on avoiding powers," reinforces both (1) the function of the section, and its various subsections, as exceptions or limitations on avoidance powers granted elsewhere; and (2) the close connection between the transfer the trustee seeks to avoid and the transfers that come within the terms of an exception. As the Seventh Circuit put it, "Chapter 5 creates both a system for avoiding transfers and a

safe harbor from avoidance—logically, these are two sides of the same coin." Pet.App.8.[5]

In addition, §546(e) provides an exception for transfers that are, *inter alia*, settlement payments "made by or to (or for the benefit of)" half a dozen specified players in the securities industry, including "financial institution[s]." That careful enumeration of six separate entities would be for naught if Merit were correct and every settlement payment executed via wire transfer were exempt. Section 546(e) addresses three categories of transfers—margin payments, settlement payments, and other transfers in connection with a securities contract—that are almost always executed via wire or other bank transactions, as opposed to the physical delivery of bags of cash. *See In re D.E.I. Sys., Inc.*, 2011 WL 1261603, at *2 (Bankr. D. Utah Mar. 31, 2011) ("The Court cannot conceive of a transfer ... made by or to (or for the benefit of) a [protected entity] that would not be accomplished with the use of the banking industry."). Thus, if Congress really intended §546(e) to immunize any margin payment, settlement payment, or securities contract payment executed through a financial institution, it could have dispensed with its enumeration of the other five players in the securities market. Indeed, given the ubiquity of wire transfers in the execution of margin payments, settlement payments, and securities contracts, Congress could have simply

---

[5] That close relationship is reinforced by the procedural posture of this case. Merit raised §546(e) as an affirmative defense in its answer to the trustee's avoidance action. The transfer identified in that avoidance action would logically be the relevant transfer for purposes of the §546(e) affirmative defense.

exempted those three types of transactions *vel non* and achieved the same result. On the other hand, if Congress wanted to avoid systemic risk to the securities industry, it would make sense to enumerate six industry players central to the markets and prevent efforts by a trustee to avoid a transfer by, to, or for their benefit—but not by, to, or for the benefit of others, such as racinos. *See* pp. 28-29, *infra* (discussing the canon against superfluity).

Just as the first word of §546(e) indicates that the relevant transfer is the one the trustee seeks to avoid, the last phrase in §546(e) is to the same effect. Section 546(e)'s role as an exception to avoidance powers granted elsewhere is underscored by creating an exception to the exception for transfers involving actual fraud (§548(a)(1)(A)). And the Code creates that exception to the exception by once again focusing on the transfer the trustee seeks to avoid. Thus, "the trustee may not avoid" a transfer by, to, or for the benefit of the enumerated entities "except under section 548(a)(1)(A) of this title"—*i.e.*, unless the transfer by the debtor the trustee seeks to avoid is one that satisfies the terms of §548(a)(1)(A). Thus, from start to finish, the text of §546(e) makes clear that it creates an exception for otherwise avoidable transfers, and thus the proper focus is on the transfer by the debtor that the trustee seeks to avoid, not the component transactions by non-debtors by which the transfer is executed.

2. Multiple canons of statutory construction reinforce that interpretation.

First, there is the canon that "identical words used in different parts of the same statute are

generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995); *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994). Here, the word "transfer" recurs throughout the avoidance provisions and in §546(e). It forms the structural and substantive link between the trustee's avoidance powers and §546(e)'s bar on avoidance. *See* Brubaker, *supra*, at 9 (noting that "the 'transfer' concept" is "the fundamental transactional unit in the Code's avoiding-power provisions"). The "transfer" that the trustee "*may not avoid*" under §546(e) should logically correspond to the "transfer" that the trustee otherwise "*may avoid*" under its substantive avoidance powers, *e.g.*, 11 U.S.C. §§544(a), 545, 547(b), 548(a)(1). Merit, by contrast, would ask this Court to hold that Respondent "may not avoid" the Valley-View-to-Merit transfer because a different transfer—such as the Credit-Suisse-to-Citizens-Bank transfer—that the trustee could not avoid even apart from §546(e) satisfies the terms of §546(e). That effort to construe the relevant "transfer" in §546(e) as divorced from the transfer in the textually cross-referenced avoidance powers violates this basic canon of statutory interpretation.

Second, there is the canon that exceptions should be read "narrowly in order to preserve the primary operation of the provision." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (quoting *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)). In a variety of contexts, this Court has emphasized that "unduly generous interpretations of ... exceptions run the risk of defeating the central purpose of the statute." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 229-30 (2008)

(quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984)). As noted, §546(e) operates as a "limit[] on the avoidance powers set forth elsewhere," *Fink*, 522 U.S. at 217, and thus is an exception to the trustee's general avoidance powers. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (observing, in bankruptcy case, that a "specific prohibition" on a "general permission" must be "construed as an exception"). Construing the exception in §546(e) not just to block efforts by the trustee to avoid transfers by financial-institution debtors or to (or for the benefit of) the financial institution itself, but to shield every securities-related transaction between non-protected entities that happens to be wired through a financial institution, would give §546(e) an extravagant and unintended scope, rendering it the proverbial exception that would "swallow the rule." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 530 (2009).

Third, the canon disfavoring superfluity demonstrates that the relevant transfer for purposes of §546(e) is the transfer that the trustee seeks to avoid. Section 546(e) spells out a lengthy and precise list of different market actors that Congress has elected over a period of decades to shield from avoidance liability when it comes to margin payments, settlement payments, and securities contract transfers: "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." Reading §546(e) to bar avoidance when the trustee seeks to avoid a transfer that is made by or to (or for the benefit of) one of those entities gives effect to every item on the list. But reading §546(e) to apply to every margin

payment, settlement payment, or securities contract transfer that is routed through a financial institution "fails to give independent effect to the statute's enumeration of the specific" entities that Congress carefully selected. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001); *accord Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014) (explaining that the Bankruptcy Code's "meticulous—not to say mind-numbingly detailed—enumeration of exemptions ... confirms that courts are not authorized to create additional exceptions"); *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001).

The problem with Merit's construction is particularly evident when it comes to Congress' 2005 decision to add "financial participants" to the list of protected entities. Financial participants are defined in the Code as entities with massive exposure to the market—over $1,000,000,000 by one measure and over $100,000,000 by another. *See* 11 U.S.C. §101(22A) (defining "financial participant"). When Congress added financial participants to the list in 2005, financial institutions were already covered. Thus, under Merit's view, unless these highly-sophisticated entities were engaging in all-cash margin payments, settlement payments, and securities contract transfers, Congress accomplished nothing by purposefully adding them to the statute in 2005.[6]

---

[6] This special protection for these large entities at the core of the financial markets also belies Merit's claim that Congress actually intended to protect every party to a settlement payment, including modest investors. *See, e.g.*, Pet.Br.35.

Finally, the narrow and sensible interpretation of §546(e) urged by Respondent and adopted by the Seventh Circuit is supported by principles of interpretation that seek to construe a statute so that it protects litigants who fall within the statutory "zone of interests." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). While the Court has cut back on this principle as a prudential limitation on standing, it has simultaneously reinforced its salience as an important guide to statutory construction. *See id.* at 1387-88. And applying the principle here "requires no guesswork," because Congress specifically enumerated a "detailed" list of entities that it sought to protect through §546(e)—namely, an entity that is a "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." *Id.* at 1389.

Merit, a gaming company that invested in a racino, is concededly none of those things, yet it nevertheless invoked §546(e) as an affirmative defense based on its view that the provision applies even to a transfer by a racino to a racino if the transfer is executed via a financial institution from which the trustee seeks no relief. That reading of the statute is irreconcilable with the zone-of-interests test as articulated and recently refined by this Court. *See id.* at 1388-89. And the Court has applied a similar principle in the bankruptcy context: "Where a statute ... names the parties granted [the] right to invoke its provisions ... such parties only may act." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000). Section 546(e) "names the parties" whom Congress sought to shield from a

trustee's avoidance action. When the trustee targets a transaction between two parties far removed from the zone of interests, §546(e) does not shield them based on the happenstance that the transfer was executed via financial institutions.[7]

B. The Statutory Context Reinforces That §546(e) Applies to the Transfer the Trustee Seeks to Avoid, and Not the Transactions By Which That Transfer Is Executed.

Like the text of §546(e), the broader statutory context that surrounds it demonstrates that §546(e) applies to the the transfer that the trustee seeks to avoid, not to the component transactions by which that transfer is executed. It is "fundamental" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *accord Util. Air Regulatory Grp. v. EPA* (*UARG*), 134 S. Ct. 2427, 2441 (2014). This elemental tenet holds true in the bankruptcy context as in others. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (construing Code and observing that "a court must not be guided by a single sentence or member of a sentence, but look to the provisions of

---

[7] To be sure, if a protected entity were the debtor and a trustee sought to avoid a constructively fraudulent transfer to Merit, Merit could invoke §546(e) as a defense because the terms of the statute would be plainly satisfied and the statutory purposes would be served by not having thousands of transactions by a key hub in the securities industry re-opened. But where the transfer the trustee seeks to avoid is neither by, to, nor for the benefit of a protected entity, the principles of *Lexmark* counsel against straining to provide relief to a non-protected entity.

the whole law, and to its object and policy"); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Because the Court construes "statutes, not isolated provisions," *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010), an interpretation that "may be plausible in the abstract" must be rejected if it is "ultimately inconsistent with both the text and context of the statute as a whole," *Sturgeon*, 136 S. Ct. at 1070. Thus, even ardent textualists have recognized that "'interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.'" *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *see also UARG*, 134 S. Ct. at 2442; *Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011) (Gorsuch, J.) ("When seeking a statute's ordinary meaning we must of course take care to study not just the particular isolated clause at issue but also its surrounding context.").

The statutory context and structure support the construction urged by Respondent and adopted by the court below. In fact, multiple other provisions in Chapter 5 underscore that commonsense reading.

1. The scope of the trustee's avoidance powers, specifically the limitations on by whom and to whom an avoidable transfer may be made, strongly support Respondent's construction of §546(e). Chapter 5's avoidance powers do not empower the trustee to avoid a broad swath of transfers by or to non-debtor financial intermediaries, but rather specify by whom and to whom a transfer must be made to fall within

the avoidance power. First, as already noted, the substantive avoidance provisions give the trustee the power only to avoid transfers *by the debtor*. *E.g.*, *Barnhill*, 503 U.S. at 394; *Union Bank*, 502 U.S. at 152; pp. 6-7, *supra*. The avoidance provisions' language reflects that understanding. For example, §548(a)(1) provides that a "trustee may avoid any transfer ... of any interest of the debtor in property ... *if the debtor* voluntarily or involuntarily *made such transfer* ... with the actual intent to hinder, delay, or defraud any entity." 11 U.S.C. §548(a)(1)(A) (emphases added). Likewise, it provides that a trustee "may avoid any transfer ... of any interest of the debtor in property ... *if the debtor* voluntarily or involuntarily *made such transfer* to or for the benefit of an insider." *Id.* §548(a)(1)(B)(ii)(IV) (emphases added).

On the other end of the transfer, the avoidance provisions specify that to be avoidable, a transfer must be *to* (or for the benefit of) an entity subject to fraudulent-transfer liability. For example, the preferential-transfer provision states that "the trustee may avoid any transfer of an interest in property ... to or for the benefit of *a creditor*." 11 U.S.C. §547(b)(1) (emphasis added). And §548(d)(1) provides that an avoidable transfer occurs when the "transferee" has an interest in the property superior to others' interests.

The Code's substantive avoidance provisions thus repeatedly refer to avoidable transfers as transfers made *by* the debtor *to* a limited set of entities subject to fraudulent-transfer liability, like creditors. And when the trustee selects a transfer for avoidance, it does not pick a transfer at random and is not free to deconstruct the transaction and designate the *by* and

to as convenient. Here, for example, Respondent targeted the transfer by Valley View to Merit for avoidance because Valley View is the debtor and Merit is a recipient who obtained more than fair value in the transfer. The avoidance provisions required the trustee to target that particular transfer, and there is no logical reason that the application of §546(e) should turn on a transfer by or to anyone else (such as a transfer by Credit Suisse to Citizens Bank). Nonetheless, Merit's position creates just such a mismatch and makes a hopeless muddle of the statutory scheme, contrary to this Court's command to "interpret [a] statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks and citations omitted).

2. Next, as the Seventh Circuit recognized, the charitable contribution exception in §548(a)(2)(B) underscores that the relevant transfer for purposes of the exceptions is the self-same transfer that the trustee seeks to avoid. Pet.App.11-12. Like §546(e), the charitable contribution exception acts as a limit on the trustee's power to avoid constructively fraudulent transfers. Specifically, §548(a)(2)(B) prevents a trustee from avoiding as constructively fraudulent a "transfer of a charitable contribution" that is "made by a debtor" "to a qualified religious or charitable entity." 11 U.S.C. §548(a)(2)(B). Under the ordinary meaning of that language, the relevant "transfer" that is protected is the transfer the trustee seeks to avoid—*e.g.*, a donation by a debtor to a qualified charity.

If, however, the "transfer of a charitable contribution" is instead understood as component

transactions—*i.e.*, (1) a transfer by the debtor to a bank or check clearinghouse, followed by (2) a transfer by that financial institution to the charity—neither transfer would qualify for the charitable contribution exemption, because neither would be a transfer "made by a debtor" "to a qualified ... charitable entity." The only transfer "made by a debtor" would be to the financial intermediary, and the only transfer "to a qualified ... charitable entity" would be from the financial intermediary. The same would be true of any charitable contribution by a debtor not made in cash or in-kind. Furthermore, the charitable contribution exception is limited to contributions "made by a natural person." *Id.* §548(d)(3)(A). Subdividing a charitable contribution into components would mean that a contribution made by check or wire transfer would be doubly unprotected because it would no longer be "made by a natural person" but would be "made by" a financial institution.

This evisceration of the charitable contribution exception could not have been intended by Congress. Yet there is no reason to slice and dice transfers between racinos into their component sub-transactions when applying §546(e), while looking only to the overall transfer the trustee seeks to avoid when it comes to §548(a)(2)(B).[8]

3. Section 555 sheds further light on the proper scope of §546(e). Section 555 carves out an exception

---

[8] Nor would it make sense to apply whichever conception of the transfer—either as targeted by the trustee or as deconstructed into component transactions—that triggers an exemption. Such an approach is counter to canons favoring the consistent construction of terms and the narrow construction of exceptions.

to the Code's general prohibition against enforcement of contractual *ipso facto* clauses, *see* 11 U.S.C. §365(e). The exception applies, however, only where the same six entities enumerated in §546(e) are counterparties to a securities contract with the debtor. *See* 11 U.S.C. §555. It makes no sense to think that Congress, on the one hand, limited the protections in §555 only to specific protected entities that are parties to a securities contract, but, on the other hand, intended to protect *all* parties who receive a pre-bankruptcy payment in connection with a securities contract, so long as the payment was accomplished through a wire transfer or other similar involvement by a financial institution. In the Seventh Circuit's words: "Because section 555 focuses on the economic substance of the transaction, applying only where the named entity is a counterparty as opposed to a conduit or bank for a counterparty, section 546(e)'s safe harbor should apply in the same manner." Pet.App.12.

4. Finally, reading §546(e) to apply to component transactions, rather than the transfer the trustee seeks to avoid, would create tension with §550 as it has long been interpreted. That section is the Code's principal provision governing the trustee's authority to *recover* avoided transfers, an authority that works hand in glove with the avoidance power. Here, for example, Respondent brought an avoidance and recovery action against Merit. JA7.

Section 550(a) provides in relevant part that "to the extent that a transfer is avoided" under one of the substantive avoidance provisions, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such

property," from "the initial transferee of such transfer or the entity for whose benefit such transfer was made," or from "any immediate or mediate transferee of such initial transferee." Section 550(b) provides a defense to recovery for certain "transferee[s]" who took for value and in good faith.

Defining the "transferee" is critical to interpreting the scope of the trustee's power to recover an avoided transfer under §550, just as defining the "transfer" is critical to interpreting the scope of §546(e). Although the Code does not define the term "transferee," federal courts of appeals have for decades unanimously agreed that the "transferee" from whom the trustee can recover an avoided transaction must be an entity that has "dominion" or "control" over the transferred property, and not merely a "financial intermediary" or conduit. *Bonded Fin. Servs, Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (Easterbrook, J.); *see, e.g.*, *In re Railworks Corp.*, 760 F.3d 398, 403 (4th Cir. 2014); *In re Hurtado*, 342 F.3d 528, 534 (6th Cir. 2003); *In re Ogden*, 314 F.3d 1190, 1196 (10th Cir. 2002); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57-58 (2d Cir. 1997); *In re First Sec. Mortg. Co.*, 33 F.3d 42, 43-44 (10th Cir. 1994); *In re Coutee*, 984 F.2d 138, 140-41 (5th Cir. 1993); *In re Bullion Reserve of N. Am.*, 922 F.2d 544, 548-49 (9th Cir. 1991); *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1199-1200 (11th Cir. 1988).

Although the circuits use slightly different tests for determining who is an intermediary or conduit that does not qualify as the "initial transferee," "there is essentially *no* disagreement in the case law" on the

fundamental point that intermediaries and conduits are not transferees for §550 purposes. Brubaker, *supra*, at 7; *accord* Pet.Br.30. And there is no disagreement in this case that Credit Suisse and Citizens Bank—the financial institutions that Merit relies on in its attempt to invoke §546(e)—were intermediaries or conduits, and not transferees against whom a recovery action would lie. Indeed, courts have agreed that banks facilitating wire transfers and escrow agents distributing deposits are quintessential intermediaries who "may be disregarded" in determining the "transferee" from whom the trustee can recover an avoided transfer. *Bonded Fin.*, 838 F.2d at 893 (wire transfer); *see Ogden*, 314 F.3d at 1193 (noting that "the escrow agency was a financial conduit rather than a transferee").

To be sure, as Merit points out, avoidance and recovery are distinct concepts. Pet.Br.28-31. But the two provisions are clearly closely related, and the uniform interpretation of §550 to exclude mere conduits from the category of transferees surely reinforces the conclusion that when the trustee targets a transfer between non-financial entities and seeks recovery from the non-financial transferee, the financial intermediaries can be safely ignored.

Moreover, interpreting the avoidance and recovery powers *in pari materia* allows them to reinforce each other in sensible ways. As discussed *infra*, the initial genesis for §546(e) was a concern that vagaries concerning whether financial intermediaries were clearly mere conduits could pose risks to the securities industry. Section 546(e) was added, and

now §§546(e) and 550 reinforce each other and provide a belt-and-suspenders protection for financial institutions and other protected entities. Either they are mere conduits beyond the trustee's recovery power, or if there is some doubt whether they qualify as a transferee (as in the case that give rise to the predecessor of §546(e)), then they are covered by §546(e). One way or another, the protected entity would be entitled to immediate dismissal as Congress intended. But under Merit's view, thousands and thousands of transactions as to which recovery against a financial intermediary would never be possible—because it is obvious that they are mere conduits—are nevertheless shielded from the avoidance power, and §546(e) provides a defense to countless non-protected entities far removed from the zone of congressional interest.

C. The Purpose and Legislative History of §546(e) Demonstrate That Its Applicability Turns on the Transfer the Trustee Seeks To Avoid.

Although §546(e)'s text and context readily demonstrate that its applicability turns on the transfer that the trustee seeks to avoid, rather than the transactions by which that transfer is executed, the purpose and legislative history behind §546(e) strongly reinforce that commonsense conclusion.

Congress enacted the first version of §546(e) in 1978 in response to the decision in *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975). *See* Pet.App.13-14; Pet.Br.31-32. *Seligson* involved a commodity broker that declared bankruptcy. The trustee of the insolvent commodity

broker's estate sued the New York Produce Exchange and the New York Produce Exchange Clearing Association to avoid (as constructively fraudulent) some $12 million in margin payments made by the commodity broker to the Clearing Association in connection with ill-fated trades in cottonseed oil futures. 394 F. Supp. at 126-27. The trustee's theory was that the Clearing Association had not provided "fair consideration" in "good faith" to the broker in return for the margin payments it requested him to post. *Id.* at 133. While there was some debate over whether the Clearing Association was a proper defendant, as opposed to a mere conduit, the district court found triable issues of fact on that question and denied the Clearing Association's motion for summary judgment, thereby leaving the Clearing Association exposed to the risk of significant liability. *Id.* at 135-36.

Recognizing the substantial potential for the disruption of the commodity trading markets, Congress acted quickly to abrogate *Seligson*. It did so by creating an exception to the trustee's avoidance powers. Specifically, Congress provided that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, 92 Stat. 2549 (1978), *codified at* 11 U.S.C. §746(c) (repealed 1982); *see* S. Rep. No. 95-989, at 105 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5891.

In 1982, Congress expanded the exception to provide that a "trustee may not avoid a transfer that is a margin payment ... or settlement payment ...

made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." Pub. L. No. 97-222, §4, 96 Stat. 235 (1982), *codified as amended at* 11 U.S.C. §546(e). Congress remained acutely concerned about situations like *Seligson* where the bankrupt entity itself was a direct participant in the securities industry and where a trustee seeking to avoid transfers by such a debtor could cause ripple effects throughout the securities industry. The House Report explained that the exception was necessary "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583.

Congress subsequently expanded the list of protected entities to include "financial institution[s]" in 1984, *see* Pub. L. No. 98-353, §461(d), 98 Stat. 333 (1984), and further expanded the list in 2005 to add "financial participant" (a term defined to include certain large entities conducting billion-dollar transactions), *see* Pub. L. No. 109-8, §907(e), 119 Stat. 177 (2005); 11 U.S.C. §101(22A). As noted earlier, that last addition would have been unnecessary under Merit's view of the statute. *See* p. 29, *supra*.

Although the list of protected entities evolved, the underlying purpose of the exception did not. The House Report accompanying the 2005 amendment stressed that §546(e) was "designed to reduce systemic risk in the financial market place." H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Applying §546(e) to the transfer that the trustee seeks to avoid aligns perfectly with that congressional design. When the trustee seeks to avoid a transfer by or to (or for the benefit of) one of the protected entities—as the trustee in *Seligson* did in attempting to avoid the transfer by the bankrupt commodity broker to a clearinghouse—the exception properly bars the avoidance of that transfer. *Seligson*, 394 F. Supp. at 126-27; *see also Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849-50 (10th Cir. 1990) (holding that defendant stockbroker could invoke §546(e) in response to trustee avoidance action); *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676 (D.R.I. 1998) (discussing application of exception when protected entity was the debtor). By substantially restricting the trustee's power when a protected entity is the debtor (*i.e.*, when the transfer is by the protected entity), §546(e) prevents the bankruptcy of one hub in the securities industry from "spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1. And by shielding protected entities from even the possibility that transfers to them or for their benefit could be avoided, §546(e) provides special protection to those core participants in the securities markets. *See* Pet.App.14-15.

If, however, the "transfer" for §546(e) purposes is decoupled from the transfer that the trustee seeks to avoid, as Merit proposes, then §546(e) shields countless constructively fraudulent transfers that harm innocent creditors while posing no material, let alone systemic, risk to the securities markets. Suppose, for example, company A purchases a share of company B, and directs its bank to wire $1,000 to

company B as consideration; neither A nor B is a protected entity. Subsequently, A files for bankruptcy, and the trustee for A seeks to avoid that transfer as constructively fraudulent. *See* 11 U.S.C. §548(a)(1)(B). Prohibiting avoidance of the A-to-B transfer under §546(e) does not promote any of the policies underlying §546(e); requiring B to return the $1,000 to A poses no threat to financial or securities markets, much less a "systemic risk."[9] And there is no greater or lesser risk to the securities market if A made the initial purchase via wire transfer or from a pile of cash.

But shielding this transfer from avoidance as long as the A-B transfer was effectuated by a wire transfer from a financial institution (as Merit's position would require) would come at a great cost to the general bankruptcy policies that underlie the avoidance powers. Innocent creditors will be deprived of a $1,000 that should be rightly returned to the estate for distribution of creditors without any countervailing benefit to the markets or the repeat players enumerated for protection in §546(e).

---

[9] The same holds true even if the amount at issue were far greater than $1,000. Even if A paid B $100 million for the share, requiring B to return the $100 million to A, while an obvious imposition on B, would pose no more a threat to the financial or securities markets than would a similar damages award in a non-bankruptcy fraudulent-transfer case—or any case, for that matter.

D. Section 546(e) Does Not Apply Here Because the Trustee Did Not Seek to Avoid Any Protected Transfer.

In sum, based on the text, structure, and purpose of §546(e) and the Code, applying §546(e) in this and every other case involves two straightforward steps. First, the trustee decides to avoid a "transfer" by the debtor to a creditor or other eligible entity under one of the Code's substantive avoidance powers. Second, if §546(e) is raised as a defense to the avoidance of that transfer, the court should evaluate that transfer to determine whether it "is" a "settlement payment ... made by or to (or for the benefit of)" a protected entity. If it is, the trustee "may not avoid" the "transfer" it sought to avoid, because of §546(e). Otherwise, the trustee may proceed.

That straightforward rule resolves this case. The complaint leaves no doubt—and Merit does not dispute—that the only "transfer" the trustee seeks to avoid is the transfer *by* the debtor, Valley View, *to* Merit. *See* JA7-8; Br. of Def.-Appellee 5 (acknowledging that the "transfer" sought to be avoided was the transfer "Valley View Downs made to Merit Management in the amount of $16,503,850"). The trustee does not seek to avoid the transactions by which that Valley-View-to-Merit transfer was executed, such as the wire transfers by Credit Suisse to Citizens Bank or by Citizens Bank to Merit. Indeed, the trustee could not seek to avoid those transactions, because the trustee's avoidance power is limited to transfers by the debtor (not by Credit Suisse or Citizens Bank), and only the Valley-View-to-Merit

transfer arguably involves constructive fraud or any other basis for avoidance.

Likewise, there is no dispute that the Valley-View-to-Merit transfer that the trustee seeks to avoid does not satisfy the terms of §546(e). Even assuming that the transfer by Valley View to Merit was a "settlement payment," it was plainly not "made by or to (or for the benefit of)" any of the protected entities, because Valley View and Merit are operators of horse tracks and casinos, not protected entities. Quite correctly, Merit has never suggested that either it or Valley View is a financial institution or other §546(e)-enumerated entity; indeed, it has conceded otherwise. *See* Pet.3 (stating that "[n]either the purchaser [Valley View] ... nor Petitioner [Merit] is itself a financial institution or one of the other types of entities" in §546(e)); *see also* Pet.App.4 (Seventh Circuit observing that "it is undisputed that neither Valley View nor Merit is" any of "the entities named in section 546(e)").[10]

To be sure, this understanding of §546(e) does not mean that it could never apply to a transaction structured similarly to the stock purchase here. In fact, §546(e) *would* apply to a comparable transfer if

---

[10] Neither Valley View nor Merit (nor, for that matter, Bedford Downs or any other Bedford Downs shareholder) is a protected entity. Nor was the transfer "for the benefit" of any such protected entity. That language parallels the trustee's ability to avoid transfers that operate to the benefit of a third-party even though they do not directly receive the transfer. A classic situation is when a debtor pays off the debt a favored creditor owes a third party. Such a transfer may be an avoidable transfer for the benefit of the favored creditor even though funds went to a third party. *See* Brubaker, *supra*, at 8.

either Valley View or Merit were a financial institution. Of course, in that situation, the policy concerns that motivated the enactment of §546(e) would justify the harm to innocent creditors implicit in an exception to the trustee's avoidance powers. Here, by contrast, nothing about avoiding the transfer between aspiring racino operators would have any impact on the securities markets or financial institutions. *See* Oral Arg. Rec. at 25:09-30 (Merit counsel conceding that avoidance would inflict "absolutely no harm" on Credit Suisse, Citizens Bank, or any other entity protected by §546(e)).[11] Under these circumstances, there is no justification in text or policy to prevent the trustee from avoiding the Valley-View-to-Merit transfer and recovering over $16 million to the estate for the benefit of innocent creditors.

II. Merit's Implausible Interpretation Of §546(e) Is Meritless.

Merit's interpretation of §546(e) requires disregarding the transfer that the trustee actually seeks to avoid, artificially subdividing that transfer into the component transactions by which the targeted transfer was executed, and declaring that the targeted "transfer" cannot be avoided if any of those component transactions is "by or to (or for the benefit of)" a financial institution. Merit acknowledges as much in the first paragraph of its brief, claiming that there are "three transfers" in this case that trigger §546(e): (1)

---

[11] Confirming the immateriality of the avoidance action to both Credit Suisse and Citizens Bank, neither financial institution has sought to intervene in this case, nor indicated any support for Merit's position.

the transfer of the $55 million stock purchase price "*by*" Credit Suisse "*to*" Citizens Bank, (2) the transfer of a 30% share of $47.5 million "*by*" Citizens Bank "to" Merit upon closing of the transaction in 2007, and (3) the subsequent transfer of a 30% share of the remaining $7.5 million "*by*" Citizens Bank "to" Merit in 2010. Pet.Br.2.

The short answer to Merit's argument is that none of those transactions is the "transfer" that the trustee seeks to avoid. Indeed, none of those transfers by solvent financial institutions is even eligible for avoidance, as Respondent can only seek to avoid transfers by Valley View. The fact that §546(e) might apply to these component transactions if a trustee had a theory as to how these three transfers *by non-debtors* somehow came within the avoidance power is neither here nor there. *See* Brubaker, *supra*, at 10 (noting that construing the §546(e) transfer as subsidiary transfers produces the "nonsensical" scenario in which an "exemption" could be "invoked to shield from avoidance a 'transfer' that is *not* being challenged"). Rather, as the foregoing discussion demonstrates, Merit's effort to apply §546(e) as a defense to a transfer different from the one the trustee seeks to avoid cannot be squared with the statutory text, context, or purpose. None of Merit's arguments in favor of its view justifies departing from traditional principles of statutory interpretation, let alone requires this Court to embrace a view of the statute that needlessly harms innocent creditors.

A. The Plain Language of §546(e) Does Not Support Merit's Interpretation.

Merit repeatedly touts its "plain language" approach to construing §546(e). *See, e.g.*, Pet.Br.3,11,16,20,36. But nothing in the plain language of §546(e)—or any other provision in the Code—suggests, much less dictates, that a court should subdivide the "transfer" that the trustee seeks to avoid into component transactions. In reality, the text provides multiple indicators to the contrary. *See* pp. 22-26, *supra*.

Merit's assertion that Valley View's purchase of Merit's shares in Bedford Downs must be understood not as a single transfer but as a series of separate transactions from Credit Suisse to Citizens Bank to Merit "exalt[s] form over substance." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013). The Bankruptcy Code has long overlooked intermediate steps in a transaction, especially when seeking to determine whether a transfer by the debtor to some third party (who could be anyone from a favored junior creditor to a family member) was fraudulent or otherwise avoidable. *See Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 233 (1933) (Cardozo, J.). The precise mechanism by which the transfer was executed, by wire transfer or bags of cash, is not the point. Making it the point, as Merit would do, is quite literally to elevate the form of the transaction over the substance of the transfer.

Merit's approach similarly conflicts with the "ordinary, contemporary, common meaning" of the operative statutory language. *Star Athletica*, 137 S. Ct. at 1010. No ordinary English speaker would

describe a transaction involving a bank, a classic intermediary, in the terms that Merit insists must be used here. A teenager who receives a check from her neighbor for babysitting services would not tell her parents that she had just been paid by the drawee bank. Nor would most homeowners say that their monthly mortgage payments are paid by their financial institution or the ACH clearinghouse. In everyday parlance, the existence of such ministerial, intermediary steps is not the point and so is simply assumed without saying. So too, no one would reasonably understand Valley View's purchase of Merit's shares to be a transfer by Credit Suisse to Citizens Bank, or by Citizens Bank to Merit. That is especially true in a context where what matters is not how Valley View got the money to Merit, but whether Valley View paid Merit entirely too much, such that Valley View's trustee can get the money back from Merit. Precisely how Valley View wired the money to Merit is no more critical than precisely how Merit will wire the money back to the estate if the trustee prevails.

That natural understanding is reflected in the way the parties themselves have described the underlying transfer. Merit has repeatedly (and correctly) described the operative transfer as one in which "Petitioner" Merit "and others sold securities *to* Respondent's predecessor in interest," Valley View. Pet.Br.2 (emphasis added). Likewise, below, Merit acknowledged that the trustee sought "avoidance and recovery of" the transfer that "Valley View Downs made to Merit Management in the amount of $16,503,850." Br. of Def.-Appellee 5. Similarly, the district court repeatedly and accurately described the

transfer as one by Valley View "to Merit." Pet.App.20-21; *see* Pet.App.19. And the documents exchanged between the parties in the course of the transaction—including the settlement agreement itself—repeatedly and emphatically confirm that the "settlement" was "to be paid *to* the Shareholders of [Bedford Downs, including Merit] *by* ... Valley View." JA64 n.* (emphases added); pp. 10-13, *supra*. None of these common-sense, real-time characterizations of the stock purchase squares with Merit's *post hoc* reconceptualization of the transfer as the sum of various intermediary transactions for §546(e) purposes.

B. Merit's Challenge to a "Beneficial Interest" Requirement Attacks a Straw Man.

While largely ignoring the relevant question of which "transfer" matters under §546(e), Merit devotes considerable effort to attacking what it sees as an improper, judicially-created "beneficial interest" requirement. Pet.Br.4,15-18,25-26. In Merit's view, such a requirement would contradict the plain language of §546(e) by nullifying the disjunctive "or" in the parenthetical clause "by or to (*or* for the benefit of)."

Merit's argument is unpersuasive for multiple reasons. First, it is a *non sequitur*, because the transfer the trustee sought to avoid—the proper starting point for construing and applying §546(e)—was by Valley View and both to *and* for the benefit of Merit. This case is not the relatively unusual case where the party who directly receives the transfer is not the party that benefits from the transfer. But if

the $16 million went not to Merit, but to some non-protected-entity third party that Merit owed $16 million, then the "for the benefit of" language would be triggered and §546(e) would just as inapplicable. The transfer here was not for the ultimate benefit of some protected entity. Thus, the "for the benefit of" language is simply beside the point.

Merit nonetheless seizes on isolated language in the Seventh Circuit opinion (and an Eleventh Circuit opinion two decades ago) observing that the recipient of a transfer that qualifies for protection under §546(e) will generally have a beneficial interest in the transfer. Pet.App.12-13; *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996). But neither court imposed (or even purported to impose) any extra-statutory requirement of the kind that Merit suggests. To the contrary, both courts simply observed, in construing §546(e) as part of an integrated statutory scheme, that the provisions in §550 governing the recovery of avoided transfers have been uniformly interpreted to apply only to transfers over which the "transferee" has "control" of the funds. Pet.App.12-13 (quoting *Bonded Fin.*, 838 F.2d at 893); *Munford*, 98 F.3d at 610 (quoting *In re Chase & Sanborn Corp.*, 848 F.2d at 1200). As discussed, that observation was entirely justified. *See* pp. 36-39, *supra*. But it was not essential to the holding of either court, both of which ultimately concluded that §546(e) does not apply for the straightforward reason that the transfer that the trustee sought to avoid was not a transfer by or to (or for the benefit of) a protected entity. Pet.App.7-8; *Munford*, 98 F.3d at 610. Merit's argument thus attacks a straw man.

Straining even harder, Merit suggests that Congress sought to overrule the purported holding in *Munford*—and thus, presumably, to preclude the Seventh Circuit's position in this case—through the remarkably subtle stratagem of adding the "(or for the benefit of)" parenthetical to the statute in the Financial Netting Improvements Act of 2006 (FNIA), Pub. L. No. 109-390, §5(b)(1), 120 Stat. 2697-98. Pet.Br.18. But that is pure imagination. Nothing in the text or the legislative history, which characterized the FNIA as making only "technical changes" to the Bankruptcy Code, H.R. Rep. No. 109-648, at 1-2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1585-86, even remotely suggests that Congress intended to overrule the two-decades-old court of appeals decision in *Munford* with respect to §546(e) by the extraordinarily roundabout means of inserting a *parenthetical* not just in §546(e) but in four different subsections of §546, *see* FNIA §§5(b)(1)-(4). To put it mildly, one would expect to "see some affirmative indication of intent" if Congress actually meant to make such a departure. *Jevic*, 137 S. Ct. at 984. After all, Congress does not "hide elephants in mouseholes," *id.* (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)), let alone in parentheticals, *see Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) ("A parenthetical is, after all, a parenthetical.").

Indeed, if anything, Congress' addition of "(or for the benefit of)" in §546(e) only underscores the textual and structural interconnection between §546(e) and the cross-referenced avoidance provisions, because those provisions allow a trustee to avoid specified transfers made not only "to" but also "for the benefit of" certain creditors. *E.g.*, 11 U.S.C. §§547(b)(1),

548(a)(1)(B); *see also* Brubaker, *supra*, at 14. As explained above, the express textual and structural interconnections between §546(e) and the substantive avoidance provisions require that the former be interpreted *in pari materia* with the latter. The addition of the phrase "(or for the benefit of)" to §546(e) prevents the possibility that a trustee's avoidance authority vis-à-vis a protected entity might be modestly broader than the exception set forth in §546(e), *i.e.*, that a trustee could seek to avoid a transfer for the benefit of a protected entity and yet §546(e) would except only transfers by or to such an entity. That is a technical fix worthy of a technical amendment (and suitably placed in a parenthetical). And the fact that §546(e) now even more closely mirrors the language in the avoidance provisions further solidifies the link between the avoidance-authorizing and the avoidance-prohibiting provisions and reinforces the wisdom of reading them together.

C. Merit's Appeals to Statutory Purpose and History Backfire.

1. Merit suggests that the reading of §546(e) advanced by Respondent and adopted by the Seventh Circuit would not actually overrule the *Seligson* decision that prompted Congress to enact §546(e)'s predecessor. Pet.Br.31. But that is doubly inaccurate. Both the debtor and the transferees targeted by the trustee in *Seligson* were protected entities. Thus, under Respondent's position, §546(e) would provide a defense to the defendants in cases like *Seligson* both because the transfer the trustee would seek to avoid is *by* a protected entity and because the transfer is *to* a protected entity. Here, of course, the debtor is not a

protected entity, and the trustee did not target a transfer to a protected entity for avoidance or seek any relief from a protected entity. As Merit acknowledges, the trustee brought an action against the shareholders in an aspiring racino, which is not a protected entity. And as Merit also concedes, the racino-to-racino transaction the trustee seeks to avoid does not implicate Congress' stated purpose in enacting §546(e)—to protect certain financial institutions and ensure that the ripple effects of an avoidance do not spread to other firms in, or threaten the collapse of, the securities market. Pet.App.15; *see* Pet.Br.36.

Merit suggests that Congress' actual purposes were broader than those Congress articulated. In Merit's telling, Congress' approach to §546(e) has been "prophylactic, not surgical from the beginning." Pet.Br.41. In reality, Congress has gradually and meticulously expanded the list of entities protected by §546(e) through a series of relatively narrow amendments adopted over several decades. Pet.Br.4-7. And yet, Merit's position is that when Congress added financial institutions to the list of protected entities in 1984, it actually protected the other protected entities and everyone else on the planet, including the "financial participants" subsequently added in 2005, as long as the securities-related transfer was routed through a bank. There is no explanation for that bizarre statutory evolution or that degree of prophylaxis (especially when expanded prophylaxis comes at the expense of innocent creditors). Indeed, Merit's suggestion that Congress wanted to protect all investors, not just six specialized players, is not only implausible, *see Law*, 134 S. Ct. at 1196 (explaining that carefully enumerated

exceptions cannot be expanded), but would leave an odd lacuna for all-cash investors (who, if they exist at all, would probably need the most protection).

Merit further argues that Congress' later amendments to §546(e) render the 1982 House Report irrelevant. Pet.Br.40. But those later amendments simply *supplement* the 1982 statute by adding additional protected entities or making "technical changes," so there is no reason to believe they somehow abrogated Congress' underlying expressed purpose. At a minimum, the burden is on Merit to show "some affirmative indication of intent" by Congress to displace its initially stated purpose. *Jevic*, 137 S. Ct. at 984. But Merit identifies *no* legislative history to support its theory of expanded congressional intent. To the contrary, the 2005 House Report confirms that §546(e) was "designed to reduce systemic risk in the financial marketplace," a concern implicated when the trustee targets a transfer by, to, or for the benefit of a protected entity for avoidance, but not when a trustee targets a racino-to-racino transfer that was executed via financial institutions. H.R. Rep. No. 109-31(I), at 3.

2. Unable to rely on the purposes articulated by Congress in the statutory text or on legislative history, Merit resorts to arguing that "Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address." PetBr.42. But recognizing that not every statute is a rifle shot is no excuse for a blunderbuss approach that obliterates Congress' evident intent. In a search for alternative congressional purposes, Merit posits a concern for the "finality" of transactions. Pet.Br.39-

40. In a context other than bankruptcy and avoidable transfers, that concern might move the needle. But in the context of an exception to an avoidance power that is at war with finality, the sensible conclusion is that Congress was concerned about finality to the precise degree necessary to shield protected entities and avoid ripple effects to the securities industry. Beyond that specific concern, which is concededly not implicated here, there is no hint that concerns about finality trumped the interest in protecting innocent creditors that underlies the avoidance authority.

Merit's protest that, under the reading advanced by Respondent and the Seventh Circuit, the "avoidability of a transfer, or a portion of a transfer, would depend on the identity of the investor and the manner in which it held its investment," Pet.Br.33, is nothing more than a facial attack on the text of the statute itself and the method that Congress chose for pursuing its objective. Section 546(e) is intended to prevent certain enumerated entities from having to return money because doing so could, for example, trigger liquidity concerns that could ripple across the financial markets. It is not a general warranty protecting everyone who engages in securities transactions from having to return inequitably received money.

The same principle forecloses the suggestion in the *amicus* brief filed by shareholders in the pending *Tribune* litigation. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed*, No. 16-317 (U.S. Sept. 9, 2016). The *Tribune* defendants argue that §546(e) should apply to them because the transfers in their case

purportedly affected a large number of publicly-traded shares issued by concededly non-protected entities. Br. for Various Former Tribune and Lyondell Shareholders 5-7. But there is no "too big to avoid" exception in §546(e). The *Tribune* shareholders' concern is thus "better directed to Congress," not this Court. *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2119 n.7 (2013).

Moreover, the massive overreading of §546(e) proposed by Merit and its *amici* not only fails to further the purpose of the statute, but directly undermines it. If all it takes to fit into §546(e) is a settlement payment routed through a financial institution, any investor of even minimal savvy can find a way to exploit that artificial loophole. Indeed, following rulings by courts of appeals adopting Merit's theory, commentators have advised practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds ... may be exempted from avoidance." Irving E. Walker & G. David Dean, *Structuring A Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16, 72 (2009). Given Merit's view of the statute, that is sound advice, but that just underscores that Merit's view of the statute is unsound.

Finally, Merit attempts to limit its otherwise limitless conception of §546(e) by contending that §546(e) should apply "at the very least," when the transfer "involves a financial institution that plays a part or serves in a role roughly comparable to a broker or a clearing agency," Pet.Br.45. Merit's felt need to manufacture an artificial, unadministrable, wholly

atextual constraint on its otherwise boundless interpretation of §546(e) is a telling indicator that its position in this case is at odds with Congress' purpose. Congress enacted an exception to the avoidance power that protects six specified players in the securities industry. Merit's suggestion that either this list should be expanded massively or, as a fallback, §546(e) should at least cover situations where non-protected entities utilize intermediary financial institutions in a manner "roughly comparable to a broker or a clearing agency" demonstrates that neither position conforms to Congress' text or intent.

In the end, text, context, and purpose all point in the same direction here. Section 546(e) is an exception to the trustee's avoidance powers. When the question is whether a transfer is avoidable in the first instance, there is no question that the relevant transfer is the one the trustee seeks to avoid. When the question is whether §546(e) provides a defense, there is no reason to look to some other transfer or to fixate on the transactions by which the challenged transfer was executed. Doing so, as Merit suggests, not only deviates from the statutory text and context, but produces results that only the recipient of an avoidable transfer could love. None of the protected entities benefits from Merit's interpretation. No potential ripple effect on the securities market is implicated. Yet the interests of innocent creditors are very much implicated and those interests should not be shortchanged where no countervailing congressional purpose is advanced.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

WILLIAM T. REID, IV
GREGORY S. SCHWEGMANN
JOSHUA J. BRUCKERHOFF
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Highway
Building C, Suite 300
Austin, TX 78746

PAUL D. CLEMENT
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondent

September 11, 2017

ECORD
AND
RIEFS

No. 16-784

FILED
OCT - 5 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
LAURA UBERTI HUGHES
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

(CIRCUIT PRINT) BRIEFS (800) 225-6964

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. A Trustee Cannot Disregard a Transfer By or To a Financial Institution That Was an Integral Part of an Overall Transaction Merely Because the Trustee Insists That He Seeks Only To Unwind the Broader Transaction 3

A. The purchase and sale of stock in this case was an integrated transaction involving multiple transfers 4

B. Respondent's arguments for disregarding the component transfers are unpersuasive 6

II. Respondent's Conception of the Purpose of Section 546(e) Is Inconsistent with the Statute's Actual Terms and Purposes 10

A. Respondent's argument does not explain why Congress protected transfers "by" financial institutions, stockbrokers, and other specified entities that become debtors, and not merely transfers "to" them 11

B. Respondent's argument does not account for the safe harbor's protection of transfers of debtors' property "by" non-debtor financial institutions, stockbrokers, and others 13

TABLE OF CONTENTS – Continued

Page

C. Respondent's argument does not make sense of Congress's decision to protect subsequent transferees and other Section 550 defendants 14

D. The statute's protection of these transfers indicates that Congress had broader goals, including protecting parties' interests in the finality of transactions in securities and commodities 15

III. Respondent Misreads the Statutory Context and History 18

A. Petitioner's interpretation of Section 546(e) is consistent with the statutory context 18

B. Respondent's analysis of *Seligson* and former Section 764(c) is erroneous 19

C. Respondent's use of legislative history is unpersuasive 20

IV. A Broad Interpretation of Section 546(e) Does Not Portend the Demise of Fraudulent-Transfer Law 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

A.D.M. Corp. v. Thomson, 707 F.2d 25 (1st Cir. 1983) 13

In re Besing, 981 F.2d 1488 (5th Cir. 1993) 8

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 8, 24

Contemporary Industries Corp. v. Frost, 564 F.3d 981 (8th Cir. 2009) 10

In re Criswell, 102 F.3d 1411 (5th Cir. 1997) 8

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) 22

In re Freedom Group, Inc., 50 F.3d 408 (7th Cir. 1995) 8

In re Global Crossing, Ltd., 385 B.R. 52 (Bankr. S.D.N.Y. 2008) 24

Graham County Soil & Water Conservation District v. United States ex rel. Wilson, 559 U.S. 280 (2010) 22

In re Hulm, 738 F.2d 323 (8th Cir. 1984) 8

Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) 16

In re Loranger Manufacturing Corp., 324 B.R. 575 (Bankr. W.D. Pa. 2005) 25

In re Marshall, 550 F.3d 1251 (6th Cir. 2008) 8

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 10, 22

TABLE OF AUTHORITIES – Continued

Page

Patterson v. Shumate, 504 U.S. 753 (1992) 17

In re Quebecor World (USA), Inc., 719 F.3d 94 (2d Cir. 2013) 25

In re Resorts International, Inc., 181 F.3d 505 (3d Cir. 1999) 23

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979 (2d Cir. 1981) 23

Seligson v. New York Produce Exchange, 394 F. Supp. 125 (S.D.N.Y. 1975) 19, 20

In re Smith, 811 F.3d 228 (7th Cir. 2016) 8

In re TOUSA, Inc., 680 F.3d 1298 (11th Cir. 2012) 23

In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317) 17

In re TVGA Engineering, Surveying, P.C., 562 B.R. 862 (Bankr. W.D.N.Y. 2016) 25

STATUTES

11 U.S.C. § 101 4

11 U.S.C. § 101(22)(A) 14, 19

11 U.S.C. § 101(25) 22

11 U.S.C. § 101(53A)(B) 19

11 U.S.C. § 107(d) (1976) (repealed 1978) 7

11 U.S.C. § 544 7

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 544(a) 7
11 U.S.C. § 544(b)(1) 7
11 U.S.C. § 545 7
11 U.S.C. § 546 16
11 U.S.C. § 546(e) ..... *passim*
11 U.S.C. § 547 7
11 U.S.C. § 547(b) 7
11 U.S.C. § 548(a)(1) 7
11 U.S.C. § 548(a)(1)(A) 7
11 U.S.C. § 548(a)(1)(B)(ii)(I)-(III) 7
11 U.S.C. § 548(a)(1)(B)(ii)(IV) 7
11 U.S.C. § 548(a)(2) 18
11 U.S.C. § 548(e)(1)(B) 7
11 U.S.C. § 550 ..... 8, 9, 15
11 U.S.C. § 550(a) 8, 14
11 U.S.C. § 550(c) 16
11 U.S.C. § 555 ..... 18, 19
11 U.S.C. § 741(7) 22
11 U.S.C. § 761(4) 22
11 U.S.C. § 764(c) (repealed 1982) 19, 20
12 U.S.C. § 2605(g) 5
Bankruptcy Act of 1898 7

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

12 C.F.R. § 220.4(d) 13

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 5

Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829 (1985) 16, 17

H.R. Rep. 103-835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340 16

H.R. Rep. No. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 21

INTRODUCTION

FTI insists that nothing about the Valley View-Merit transaction is relevant other than what it describes as the overall transfer made "by" Valley View and "to" Merit. Yet there is no dispute that there was no direct transfer between these parties. Rather, at Valley View's request, its lender, Credit Suisse, transferred $55 million to Citizens Bank, and Citizens transferred that money over a period of several years to Merit and the other former shareholders of Bedford Downs for their stock. Simply put, the transaction required several transfers, both "by" and "to" financial institutions, along the way.

Under the text of the statute, these undisputed facts matter. Section 546(e) provides that a trustee may not avoid a transfer "by," "to," or "for the benefit of" a financial institution or another type of entity specified in the statute. And those entities include securities clearing agencies and other firms that almost always function as intermediaries, not as the beneficial holders of securities. Nothing in this language suggests that the trustee can simply ignore the actual mechanics of a transaction. Rather, as most circuits to consider the issue have held, the words Congress chose demonstrate that it intended to protect a securities transaction in which a financial institution, securities clearing agency, or other specified entity served as an intermediary.

FTI's justification for its contrary approach requires it to elide important distinctions on both the *by*

and the *to* ends of the transfer. One of Congress's purposes in enacting and repeatedly expanding Section 546(e) was no doubt to protect from liability the six types of firms identified in the statute. But FTI's premise that this was Congress's *only* objective cannot be right. By its terms, the statute bars a trustee from avoiding not only a transfer made "to" any of the specified entities, but also a transfer "by" such an entity to a recipient that is *not* an entity specified in the statute. FTI's narrow reading of Congress's intent – as seeking only to preclude recovery *from* the listed institutions – does not account for the decision to insulate an individual investor or another recipient that is not named in the statute from liability in such a situation.

To be sure, Congress did not leave reports or floor debates that explain precisely what it hoped to accomplish when it expanded the statute over the last few decades. But the development of the text shows that Congress has progressively restricted a trustee's power to disturb settled securities and commodities transactions, thereby enhancing the interests of the parties in finality and the national interest in encouraging investment by reducing long-tailed risks to investors.

FTI also claims that if Merit prevails, a financial institution's payment of a check or receipt of a wire transfer would be sufficient to insulate any transaction from avoidance. Many of FTI's arguments, including superfluity and exception-swallowing-the-rule (Resp. Br. 27-29), turn on that supposition. But those are not

the facts of this case, nor of any of the others comprising the circuit split. And in the 33 years since financial institutions were added to Section 546(e), only a handful of bankruptcy and district courts have drawn the conclusion that FTI says is inevitable if this Court reverses: that the passive processing of a payment by a bank will be sufficient to trigger the safe harbor.

The banks in this case were active participants in a securities transaction, providing financing, arranging the proper exchange of the cash and securities involved, and holding a portion of the funds for years. A reversal in this case will not open Pandora's box. Nor will it gut fraudulent-transfer law, which will continue to apply to actual fraud in securities and commodities transactions and in all respects in other fields. Rather, a reversal here will simply mean that this Court has given effect to the words of the statute and has left to Congress the decision whether to make further adjustments to its scope.

ARGUMENT

I. A Trustee Cannot Disregard a Transfer By or To a Financial Institution That Was an Integral Part of an Overall Transaction Merely Because the Trustee Insists That He Seeks Only To Unwind the Broader Transaction.

FTI argues that the transfers by and to financial institutions in this case do not matter, because a court

must evaluate "the transfer by the debtor that the trustee seeks to avoid, not the component transactions" (Resp. Br. 22). And in this case, FTI insists, the transfer it attacks was made solely by Valley View and solely to Merit. This approach represents an effort to gloss over the actual facts of the transaction and their legal import.

A. The purchase and sale of stock in this case was an integrated transaction involving multiple transfers.

FTI's characterization of the complex transaction at issue here as a single transfer of $16.5 million from Valley View to Merit – and only this single transfer – blinks reality.[1] True, in the end, Valley View paid Merit and others $55 million for the stock of Bedford Downs. But it accomplished that payment in several steps, each of which was itself a transfer of an interest in Valley View's property. For example, Merit explained in its opening brief that Credit Suisse's payment of the purchase price to Citizens was a transfer, as defined in Section 101 (Pet. Br. 19). FTI has not disputed this analysis.

An example from FTI's brief demonstrates the point. FTI argues that most homeowners would not say

---

[1] FTI suggests that Merit agreed below with its characterization of the stock transaction as a single transfer (Resp. Br. 16, 44, 49). But the sentence from which FTI quotes was simply Merit's summary of the complaint, not an acknowledgment that it was legally or factually sound (7th Cir. Appellee Br. 5). In any event, Merit referred there to "transfers" – plural.

that their mortgage payments were paid by their bank (Resp. Br. 49).[2] Perhaps not, but a typical mortgage payment includes a component held in escrow by the lender for property taxes and insurance. *See* 12 U.S.C. § 2605(g). A homeowner might say any of the following about this arrangement:

- I paid this month's escrow payment.
- The lender paid the property taxes after the county sent a bill.
- I paid my property taxes before year-end.

All of these statements are accurate, but they describe interrelated transactions. To "avoid" means to "undo," as FTI suggests (Resp. Br. 1), or "[t]o render void." Black's Law Dictionary 163 (10th ed. 2014). The homeowner could not avoid his transfer to the taxing authority without also undoing its indispensable parts: the transfers by and to the lender.

The same is true here. There was no discrete or independent transfer from Valley View to Merit. The plain language of Section 546(e) asks whether a transfer was either "by," "to," or "for the benefit of" a financial institution or other specified entity. Nothing in the words of the statute suggests that a trustee can recharacterize the transaction to ignore its parts and the involvement of the entities that trigger the safe harbor.

---

[2] FTI here parts ways with the Seventh Circuit, which agreed with FTI's argument that the word "by" was ambiguous and gave electronic bill payment as an example (Pet. App. 5).

Indeed, no court – including the Seventh Circuit below – has adopted FTI's argument. Although the courts of appeals have reached different conclusions, all have focused on whether what FTI terms "component" transfers were made "by" or "to" a financial institution or another entity specified in Section 546(e). None has suggested that a court can simply ignore the component transfers, as if they never occurred.

B. Respondent's arguments for disregarding the component transfers are unpersuasive.

FTI insists that a trustee "is not free to deconstruct the transaction and designate the *by* and *to* as convenient" (Resp. Br. 33-34). But it is FTI that does this, repackaging the transaction to fit its argument. FTI's justification for ignoring the component transfers appears to be derived from its view that it could not have avoided them anyway, and so Congress could not have intended them to have any significance (*id.* 24).

1. Part of FTI's argument is that it could not have avoided a transfer made *by* Credit Suisse, because Credit Suisse was not the debtor in the underlying bankruptcy case (*id.* 23-24). This theme underlies many of FTI's other arguments (*id.* 2, 6-7, 18, 33). Despite stray comments by courts and commentators to this effect, it is contrary to the language of the Bankruptcy Code.

The Bankruptcy Act of 1898 permitted a trustee to avoid a fraudulent transfer "by a debtor." 11 U.S.C. § 107(d)(2), (3) (1976) (repealed 1978). But the analogous section of the Bankruptcy Code retained that requirement only in two situations: a transfer motivated by actual intent to hinder, delay, or defraud creditors, and a transfer to an insider under an employment contract. *See* §§ 548(a)(1)(A), 548(a)(1)(B)(ii)(IV). In 2005, Congress added a third: a trustee may avoid a transfer to a self-settled trust if, among other things, "such transfer was by the debtor." § 548(e)(1)(B).

Outside of these specific circumstances, a trustee may avoid a fraudulent transfer made by a non-debtor so long as the transfer is "of an interest of the debtor in property." § 548(a)(1). Of particular relevance to this case, a trustee may avoid a transfer as a constructive fraudulent conveyance if the debtor did not receive fair value in exchange and the debtor was insolvent or otherwise in financial distress. *See* § 548(a)(1)(B)(ii)(I)-(III). The statute does *not* require that the transfer was made by the debtor. Thus, nothing (other than the safe harbor) would preclude FTI from attempting to avoid Credit Suisse's transfer of the purchase price – funds in which Valley View had an interest, since it had borrowed and agreed to repay them – to Citizens.[3]

---

[3] The other relevant avoidance statutes are consistent. Sections 544 and 547 refer to a transfer of the debtor's property or interest in property, and Section 545 involves the fixing of a lien on the debtor's property. §§ 544(a), 544(b)(1), 545, 547(b). The identity of the party that causes the transfer to occur is not significant.

Avoidance actions arising from transfers by non-debtors are relatively common, and the idea that a trustee has standing to pursue them is not controversial. This Court, for example, considered a lender's foreclosure sale of a debtor's real estate in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The Court rejected the claim because the debtor received reasonably equivalent value, not because the transfer was made by the lender. *See id.* at 545.[4]

2. FTI also argues that Citizens is not an "initial transferee" exposed to liability under Section 550, and so the transfer to Citizens may be disregarded (Resp. Br. 38). This argument inappropriately relies on the ability of a trustee to *recover* from a particular defendant under Section 550 to limit the scope of *avoidance* under Section 546(e). But, by precluding avoidance of a transfer altogether, Section 546(e) bars the trustee from recovering from *any* potential defendant. *See* § 550(a) (permitting trustee to pursue recovery only "to the extent that a transfer is avoided"). FTI

---

[4] Other examples of potentially avoidable transfers made by non-debtors include *In re Smith*, 811 F.3d 228, 236 (7th Cir. 2016) (tax sale); *In re Marshall*, 550 F.3d 1251, 1256 (6th Cir. 2008) (balance transfer between credit-card issuers); *In re Criswell*, 102 F.3d 1411, 1415 (5th Cir. 1997) (creditor's recording of judgment abstract); *In re Freedom Group, Inc.*, 50 F.3d 408, 410 (7th Cir. 1995) (creditor's garnishment of bank account); *In re Besing*, 981 F.2d 1488, 1494 (5th Cir. 1993) (court's dismissal of causes of action); and *In re Hulm*, 738 F.2d 323, 325 (8th Cir. 1984) (sheriff's deed following judicial foreclosure).

pays lip service to the idea that "avoidance and recovery are distinct concepts" (Resp. Br. 38), but its circular reasoning hopelessly conflates the two.

The argument also overlooks the actual timing of the transaction. For three years – a period that included the commencement of Valley View's bankruptcy case – Citizens was in possession of millions of dollars. Because the conditions for the release of the funds had not been satisfied, the eventual recipient of the money remained uncertain. Had a trustee brought suit during that period, and assuming that the fraudulent-transfer claim otherwise had merit, recovery of those funds from Citizens would have been the only rational result. FTI's argument does not account for the fact that Citizens would have been a proper defendant in an avoidance and recovery action for a long period of time, except that the safe harbor plainly would have barred the claim.

In any event, FTI's argument again ignores the words of the statute. Section 550 permits a trustee to recover an avoided transfer from a "transferee," a term that many courts have construed to exclude an intermediary that did not obtain a beneficial interest in the transferred property. Section 546(e) does not use that term. It applies if the transfer was "by," "to," *or* "for the benefit of" a financial institution. If, as here, the transfer was "by" (and "to") a financial institution, there is no statutory requirement that it *also* have been "for the benefit of" a financial institution. The disjunctive use of these three terms, as well as the inclusion in Section 546(e) of entities that virtually never transfer

securities for their own benefit, is telling. Congress must have intended the safe harbor to apply where a transfer is made *by* or *to* a specified entity, even if that entity did not have a beneficial interest in the transferred property.

FTI attempts to sweep away the question on which the Court granted certiorari, declaring the difference between "to" and "for the benefit of" to be a straw man (Resp. Br. 51). But the significance of an institution's beneficial interest in a transaction is at the heart of the circuit split. *Compare In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (disregarding financial institution because it "never acquired a beneficial interest in the funds"), *with Contemporary Industries Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009) (statute "does not expressly require that the financial institution obtain a beneficial interest in the funds"). In any event, there is no practical distinction between "no beneficial interest" and the concept that FTI finds determinative – "financial intermediary or conduit." Whether FTI uses the term "beneficial interest" or not, the only reason it can argue that the financial institutions in this case should be ignored is its view that they had no beneficial interest in Valley View's payment.

II. Respondent's Conception of the Purpose of Section 546(e) Is Inconsistent with the Statute's Actual Terms and Purposes.

FTI tethers its interpretation of Section 546(e) to what it claims was Congress's only purpose when it

originally enacted the provision back in 1982: preventing the insolvency of one commodities or securities firm from spreading to others (Resp. Br. 41). According to FTI, the safe harbor protects transfers only "to the precise degree necessary to shield protected entities and avoid ripple effects to the securities industry" (*id.* 56). The actual words of the statute, in its original form and especially as amended, suggest far-broader congressional concerns. Because Section 546(e) in fact extends much further than FTI suggests, the legislative history of the original provision cannot constrain the meaning of the present-day statute.

A. Respondent's argument does not explain why Congress protected transfers "by" financial institutions, stockbrokers, and other specified entities that become debtors, and not merely transfers "to" them.

FTI's narrow construction of Congress's legislative objectives cannot be reconciled with a basic feature of Section 546(e): it protects a transfer if it is "by," and not merely if it is "to," a financial institution or other specified entity. Avoidance and recovery of a transfer made *by* an insolvent securities or commodities firm does not inherently spread market instability. Yet, by its plain terms, Section 546(e) would bar such a suit, even if the defendant was an individual investor, a 401(k) plan, a commercial business, or some other entity not named in Section 546(e). And this is true even if avoidance and recovery of the assets might permit the debtor firm to

return to solvency, continue in business, and honor its obligations. Barring avoidance actions in those circumstances cannot be explained by FTI's characterization of Congress's supposed sole purpose.

FTI acknowledges that the safe harbor would apply to a securities-related transfer by a financial-institution debtor to Merit (Resp. Br. 46). Recognizing the tension between its construct of Congress's purpose and the actual words of the statute, FTI suggests that Congress protected transfers *by* financial institutions and other specified entities because reopening "thousands of transactions by a key hub in the securities industry" would be undesirable (Resp. Br. 31. n.7). But only recovery of transfers made *to* recipients that also are industry hubs (*i.e.*, other specified entities) could expose such entities to potentially ruinous liability, and those transfers are protected independently by the "to" provision of the statute. Thus, Congress's inclusion of "by" in the statute necessarily means that its purpose was broader than FTI posits.

Moreover, reopening thousands of transfers that could be characterized as made *through* key hubs in the securities industry, which is precisely what FTI argues the statute permits (Resp. Br. 56-57), surely could be disruptive for the securities markets (Tribune/Lyondell Shareholders' Br. 5-6, 15-16). There is no reason to believe that Congress was troubled by the possibility that transfers *by* an industry hub could be

unwound but yet was unconcerned about trustees' pursuit of transfers made *through* industry hubs.[5]

B. Respondent's argument does not account for the safe harbor's protection of transfers of debtors' property "by" nondebtor financial institutions, stockbrokers, and others.

As explained above in Point I.B, Section 546(e) applies to a transfer "by" a financial institution or other specified entity even if that entity does not become the debtor in bankruptcy. This, too, cannot be reconciled with FTI's begrudging conception of the statutory purpose.

Banks and brokers have the power to transfer a customer's securities or commodities to a third-party purchaser in connection with a margin call or a pledge of stock. *See generally A.D.M. Corp. v. Thomson*, 707 F.2d 25, 26-27 (1st Cir. 1983) (discussing application of securities laws to lender's sale of unregistered securities pledged as collateral); 12 C.F.R. § 220.4(d) (requiring broker to liquidate customer's securities if customer does not meet margin call). The safe harbor

---

[5] FTI insists that avoidance of a payment between two non-hubs is not a matter of concern, whether the payment is $1,000 or $100 million (Resp. Br. 43 & n.9). But Congress chose to preclude avoidance of a payment, regardless of amount, *by* an industry hub to a non-hub, as well as avoidance of a payment of an immaterial amount such as $1,000 *to* an industry hub. Neither of these concerns can be explained solely by a legislative desire to prevent insolvencies of, or ripple effects among, industry hubs.

plainly precludes the customer's trustee from avoiding such a transfer, because it was made *by* a specified entity in connection with a securities or commodities contract, even though avoidance of the transaction would pose no threat to any other securities or commodities firm.[6]

C. Respondent's argument does not make sense of Congress's decision to protect subsequent transferees and other Section 550 defendants.

A trustee may pursue recovery of transferred property or its value from several parties, including the initial transferee, the entity for whose benefit the transfer was made, and subsequent transferees. *See* § 550(a). Where Section 546(e) bars avoidance of a transfer altogether, however, the trustee cannot recover from any of these parties, even those that are not principal players in the financial markets. Thus, the safe harbor's protection of a debtor's bargain sale

---

[6] Congress's inclusion of a bank's securities customers within the definition of "financial institution" is especially inconsistent with FTI's construction of the safe harbor. *See* § 101(22)(A). A transaction involving such a bank customer is, in FTI's view, a transfer *by* the customer *to* the counterparty, with the bank-agent acting solely as a financial intermediary. Because the customer counts as a "financial institution," a trustee could not avoid that transfer, even though the transfer did not involve any property of the bank, and regardless of the identity of the counterparty (*i.e.*, even if there could be no possible impact on a securities firm). The only conclusion is that Congress intended to protect the finality of the transaction, not just the stability of securities firms.

of securities to a broker also shields an individual who benefits from the transfer (perhaps a wealthy executive who guaranteed an underlying obligation) and a subsequent transferee of the securities (such as another customer of the broker that pays triple the initial price).

FTI's formulation of the purpose of the safe harbor does not explain why these secondary defendants, who could reimburse a trustee without causing any securities or commodities firm to fail, are shielded from liability.

D. The statute's protection of these transfers indicates that Congress had broader goals, including protecting parties' interests in the finality of transactions in securities and commodities.

The foregoing discussion demonstrates that when Congress enacted and amended Section 546(e), it must have had more in mind than merely protecting the six categories of entities specified in the statute from "having to return money" because the effect on their liquidity could "ripple across the financial markets" (Resp. Br. 56). If that were the legislature's only goal, a much simpler and more straightforward solution has always been available: allow transfers to be avoided, but provide in Section 550 that a trustee cannot recover from the six categories of entities. Indeed, Congress adopted this approach in 1994 when it disagreed with the Seventh Circuit's analysis of the preference statute in

Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989). It enacted Section 550(c), limiting the trustee's recovery to the debtor's insiders. *See* H.R. Rep. 103-835, at 44-45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3353 (explaining that § 550(c) was intended to overrule *Levit*).

Congress did not pursue that simple solution for securities and commodities transfers. Instead, it placed the safe harbor in Section 546, where it expressly overrides several avoidance powers and thereby precludes a trustee from recovering from anyone. Section 546(e) thus protects transfers, not particular transferees. *See Levit*, 874 F.2d at 1195 ("[A]voidability is an attribute of the transfer rather than of the creditor.").

Congress's choice must be respected. Although Congress did not explain precisely why it expanded Section 546(e) over the decades, the context in which the safe harbor operates suggests a sound rationale. The traditional domain of fraudulent-transfer law – sham transfers, gifts by insolvent debtors to relatives, and similar judgment-proofing actions – involves behavior that is obviously contrary to the interests of creditors. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829, 832 (1985). Transactions in securities and commodities, by contrast, present the possibility of benefits to creditors, such as a lender's receipt of interest or a vendor's profit on goods sold to the debtor. These transactions also typically occur on

terms set by the market or in arm's-length negotiations among sophisticated parties. And they are at the core of our nation's economy, in which businesses raise capital by issuing, selling, and trading securities.

A suit to avoid a constructive fraudulent transfer effectively seeks to reprice or otherwise renegotiate a transaction after the fact, and it thus disrupts the expectations of those who purchased or sold in the original transaction. *See id.* at 834 ("Allowing creditors to escape the consequences of their debtor's bad decisions after the fact has costs as well as benefits."). The possibility of such a suit, potentially years after the transfer at issue, can have a chilling effect on transactions. Congress may well have concluded that, absent actual fraudulent intent, this disruption to the nation's financial markets is not warranted. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98, 121 (2d Cir. 2016) (safe harbor reflects "a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy"), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).[7]

---

[7] FTI frequently invokes the interests of "innocent creditors," but a trustee's desire to increase the bankruptcy estate for the benefit of creditors cannot overcome a congressional determination that a particular asset should be out of reach. *See Patterson v. Shumate*, 504 U.S. 753, 763-64 (1992). In any event, the implication that recipients of fraudulent transfers are not so innocent is baseless. A claim of constructive fraud requires no malfeasance by the defendant, who may have done nothing more than receive funds in a transaction that she did not negotiate or have any power to modify (Tribune/Lyondell Shareholders' Br. 5-7).

III. Respondent Misreads the Statutory Context and History.

A. Petitioner's interpretation of Section 546(e) is consistent with the statutory context.

The context of Section 546(e) is consistent with its broad scope.

The protection of charitable contributions in Section 548(a)(2) does not undermine Merit's interpretation of Section 546(e). FTI's argument rests solely on the debtor's use of a check or wire transfer to make the contribution (Resp. Br. 34). Aside from the fact that the IRS surely would consider such a transaction to be a valid contribution by the donor to the charity, the comparison to this case is not apt. Suppose instead that the debtor-taxpayer contributed $5,000 to a family charitable trust by sending the funds to a trust company, and then a month later, the debtor directed the trust company to contribute the same amount to a charitable organization. There would be reasonable grounds for disagreement about whether the debtor made a transfer to the charity and, if so, whether it met the requirements of Section 548(a)(2). But no one would suggest that the debtor's charitable contribution was independent of the transfers to and by a financial institution by which the contribution was accomplished.

Section 555 also is no obstacle to a broad interpretation of the safe harbor. It addresses a distinct issue: whether a stockbroker, financial institution, financial participant, or clearing agency may enforce

its contractual rights under a securities contract despite the automatic stay. *See* § 555. But it does not require that the firm be a party to that contract for its own account. The definitions of stockbroker and financial institution specifically contemplate that those firms may act on behalf of their customers. *See* §§ 101(22)(A), 101(53A)(B). And a securities clearing agency does little else. Section 555 thus protects the interests of both the contracting parties and any of their customers that may have interests in the underlying transaction.

B. Respondent's analysis of *Seligson* and former Section 764(c) is erroneous.

FTI describes the safe harbor as providing "belt-and-suspenders protection" to intermediaries that should be protected from liability under Section 550 anyway (Resp. Br. 39). In certain scenarios, this is a fair characterization of today's version of Section 546(e). But it does not fit well with the statute's history.

All agree that Congress intended to overrule *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975), when it enacted the original safe harbor, Section 764(c), in 1978. But whether Congress in fact accomplished that goal depends on how its language is interpreted. *Seligson* involved margin payments that had been made by a commodities broker (Haupt) to a clearing association. *See id.* at 126-27. In response to the decision, Congress enacted a safe harbor that did *not* protect payments by brokers to

clearing agencies explicitly. Instead, Congress precluded a trustee from avoiding "a margin payment *to* or deposit *with* a commodity broker" and "a settlement payment made *by* a clearing organization." § 764(c) (repealed 1982) (emphasis added). The only way Congress's fix could have had the desired effect of producing a different result in *Seligson* was if Haupt's margin payments *to* the clearing association (the precise transfers that the trustee sought to avoid) were regarded as a component part of a larger transaction, inseparable from the margin payments that Haupt received from its customer or from the settlement payments made by the clearing association to members of the exchange, both of which Congress did address in the statute.

If FTI's construction were valid, by contrast, Haupt's trustee could have dodged the safe harbor merely by declaring that the transfers he sought to avoid were the transfers of margin payments by Haupt to the clearing association. Congress, however, must have intended that a court construe the transaction as an integrated whole. No other interpretation explains its drafting choices as it sought to overrule *Seligson*.

C. Respondent's use of legislative history is unpersuasive.

FTI relies on snippets of legislative history to suggest that Congress's repeated expansions of the scope of Section 546(e) did not alter its narrow original function of preventing ripple effects in the securities and

commodities markets. Even if that had been Congress's sole purpose in 1982, by the time Congress added financial institutions and financial participants in 1984 and 2005, the statute plainly protected against more than just existential threats to securities and commodities firms. That is the case particularly because transfers *by* firms mentioned in the statute *to* entities not mentioned had already been put beyond a trustee's avoidance powers, and because the entities specified in that provision included securities clearing agencies and others that almost always act as intermediaries between other parties (Pet. Br. 25-26). The 2006 addition of securities contracts, commodities contracts, and forward contracts represented a further expansion of coverage. And Congress also included the alternative "(or for the benefit of)" in 2006.

FTI twice asserts that Congress reaffirmed in 2005 that Section 546(e) is about "systemic risk" (Resp. Br. 41, 55). In fact, that statement from the legislative history was not specific to any section of the Code or the 2005 legislation. It was part of an introductory paragraph describing the changes made to the business bankruptcy provisions of the Code by a lengthy bill. H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

FTI also suggests that all of the 2006 amendments should be construed as "technical changes" because that phrase appears in the introduction to a House Report (Resp. Br. 52, 53, 55). But the addition of securities contracts, commodities contracts, and forward contracts – each defined expansively, *see*

§§ 101(25), 741(7), 761(4) – to the safe harbor was in no sense merely a technical change. It introduced protection for off-exchange transactions and otherwise placed an entirely new set of transfers beyond the reach of a trustee, even though avoidance of many of those transfers would pose no threat to the soundness of the principal players in the financial markets.

Professor Brubaker and FTI have offered an explanation of the addition of "(for the benefit of)" that would qualify as a technical correction (Resp. Br. 52-53). But even if Congress's particular goal were to tie the safe harbor more closely to for-the-benefit concepts found elsewhere in the Code, the amendment nevertheless undermined the reasoning of *Munford*, which disregarded a payment to a bank because the bank "never acquired a beneficial interest in the funds." *Munford*, 98 F.3d at 610.

All of the foregoing rebuts FTI's claim (Resp. Br. 52, 55) that one should expect "some affirmative indication of intent" if Congress meant to change the law. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017). *Jevic* involved "simple statutory silence" in the face of a longstanding priority system. *Id.* There is no statutory silence or elephant in a mousehole here. Congress has been openly and obviously expanding the safe harbor over the last 35 years. *See, e.g., Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010) (enforcing amendment limiting a subset of litigation that Congress apparently deemed "unmeritorious or downright harmful," even though legislative history did not

explain precise scope of amendment). What Congress has not done during that period is to overrule decisions interpreting the safe harbor broadly, including those controlling in popular venues for corporate bankruptcies. *See, e.g., In re Resorts International, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999).

IV. A Broad Interpretation of Section 546(e) Does Not Portend the Demise of Fraudulent-Transfer Law.

Amici boldly assert that "Petitioner's theory deletes 400 years of fraudulent transfer law from the books (unless the transfer at issue was made with bags of cash)" (Tribune Retiree Br. 16). FTI's rhetoric is not so extreme, but it decries "results that only the recipient of an avoidable transfer could love" (Resp. Br. 58). These statements are grossly exaggerated.

1. Bankruptcy trustees' bread and butter – transfers of real estate, personal property, and money, unrelated to the securities and commodities markets – will be unaffected by a broad reading of Section 546(e). Trustees also will be able to continue to attack complex corporate transactions, including those involving securities and commodities, on many grounds. For example, nothing in Section 546(e) bars a trustee from avoiding a debtor's obligations. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 993 (2d Cir. 1981) (discussing avoidance of debtors' guarantees of affiliates' debts); *In re TOUSA, Inc.*, 680 F.3d 1298, 1310-11 (11th Cir. 2012) (affirming judgment avoiding liens

granted by debtors). A debtor's distribution of a dividend on existing stock also may not be protected by the safe harbor. *See In re Global Crossing, Ltd.*, 385 B.R. 52, 56 n.1 (Bankr. S.D.N.Y. 2008). And the many other tools trustees have at their disposal are unimpaired, including claims to avoid actual-intent fraudulent transfers, claims against officers and directors for approving an unwise transaction, and claims for common-law fraud or breach of contract.

Thus, even if it were accurate to describe the safe harbor as an exception to the general rule permitting trustees to avoid certain transfers, the exception by no means swallows the rule (Resp. Br. 27-28). As the Court concluded in *BFP*, the constructive-fraud provisions of the Code are not rendered superfluous merely because they do not apply to a particular type of transaction. *See BFP*, 511 U.S. at 545.

2. This is not a case in which a transaction was merely "executed by wire transfer" or "routed through a bank" (Resp. Br. 25, 54). Two financial institutions were centrally involved in financing and administering the securities transaction here, and similar facts were present in all of the other cases giving rise to the circuit split. It is thus mere hyperbole for FTI to say that if Merit is protected by the safe harbor, so is "everyone else on the planet" (*id.* 54).

The question whether the safe harbor applies if a bank merely processes a check or wire transfer has arisen only in a handful of cases – none cited by FTI or its *amici* and none decided by courts of appeals – with

varying results. *Compare In re Loranger Manufacturing Corp.*, 324 B.R. 575, 585-86 (Bankr. W.D. Pa. 2005), *with In re TVGA Engineering, Surveying, P.C.*, 562 B.R. 862, 865 (Bankr. W.D.N.Y. 2016). But the Court need not determine whether passive payment processing is sufficient, because the banks involved in this case had active and substantial roles: financing the transaction, administering the closing, and ensuring that a portion of the purchase price was available to the buyer if it made an indemnity claim (which it did not) or to the seller if the buyer filed a bankruptcy petition (which it did).

Nor is there an epidemic of transactions in which financial institutions have been inserted solely to permit the parties to invoke the safe harbor (Resp. Br. 57). Should such a situation arise, the lower courts have adequate tools to address it, such as disregarding the maneuver as a sham or considering it as evidence of actual fraudulent intent. *See In re Quebecor World (USA), Inc.*, 719 F.3d 94, 100 n.4 (2d Cir. 2013).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JASON J. DEJONKER
LESLIE A. BAYLES
JUSTIN A. MORGAN
BRYAN CAVE LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601
(312) 602-5000

BRIAN C. WALSH
Counsel of Record
LAURA UBERTI HUGHES
BRYAN CAVE LLP
211 N. Broadway,
Suite 3600
St. Louis, MO 63102
(314) 259-2000
brian.walsh@bryancave.com

Counsel for Petitioner

October 2017

RECORD
AND
BRIEFS

FILED
SEP 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-784

In the
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF BANKRUPTCY LAW PROFESSORS RALPH BRUBAKER, BRUCE A. MARKELL, CHARLES W. MOONEY, JR., AND MARK J. ROE IN SUPPORT OF RESPONDENT

JERROLD J. GANZFRIED
Counsel of Record
GANZFRIED LAW
5335 Wisconsin Ave., NW
Suite 440
Washington, DC 20015
(202) 486-2004
JJG@ganzfriedlaw.com

Counsel for Amici Curiae

September 18, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

THE KEY TO UNDERSTANDING THE CORRECT SCOPE OF THE §546(e) SECURITIES SAFE HARBOR IS THROUGH THE CONCEPT OF THE "TRANSFER" THAT THE TRUSTEE SEEKS TO AVOID 7

A. The Fundamental Transactional Unit in the Bankruptcy Code's Avoidance Provisions is a "Transfer." 8

B. Legislative History Confirms Congress' Determination that the "Transfer" Sought to be Avoided is the Transactional Unit to which the §546(e) Safe Harbor is Directed ... 17

C. Congress' Intended Scope for the §546(e) Securities Safe Harbor 26

D. The Seventh Circuit's Interpretation of §546(e) is the Only Rational and Practical Reading that Conforms to the Statute's Plain Meaning and Congressional Intent 31

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Baker Botts L.L.P. v. Asarco LLC,
135 S. Ct. 2158 (2015) 3

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) 3

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 10

Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890 (7th Cir. 1988) 14, 34

Comm'r v. Lundy,
516 U.S. 235, 250 (1996) 14

Contemporary Indus. Corp. v. Frost,
564 F.3d 981 (8th Cir. 2009) 32

Czyzewski v. Jevic Holding Corp.,
137 S. Ct. 973 (2017) 2, 3

Deal v. United States,
508 U.S. 129 (1993) 25

Exec. Benefits Ins. Agency v. Arkison,
134 S. Ct. 2165 (2014) 2

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009) 14

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 25

In re Columbia Data Prods., Inc.,
892 F.2d 26 (4th Cir. 1989) 13, 14

In re Enron Creditors Recovery Corp.,
651 F.3d 329 (2d Cir. 2011) 31

In re Healthco Int'l, Inc.,
195 B.R. 971 (Bankr. D. Mass. 1996) 25, 31

In re Meredith,
527 F.3d 372 (4th Cir. 2008) 13

In re Munford, Inc.,
98 F.3d 604 (11th Cir. 1996) 25, 31

In re Ogden,
314 F.3d 1190 (10th Cir. 2002) 12

In re Plassein Int'l Corp.,
590 F.3d 252 (3d Cir. 2009) 31, 32

In re QSI Holdings, Inc.,
571 F.3d 545 (6th Cir. 2009) 32

In re Quebecor World (USA) Inc.,
453 B.R. 201 (Bankr. S.D.N.Y. 2011) 32, 33

In re Quebecor World (USA), Inc.,
719 F.3d 94, (2d Cir. 2013) 31, 32, 33

In re Resorts Int'l, Inc.,
181 F.3d 505 (3d Cir. 1999) 31

Kaiser Steel Corp. v. Charles Schwab & Co.,
913 F.2d 846 (10th Cir. 1990) 17, 29, 36

Law v. Siegel,
134 S. Ct. 1188 (2014) 2

Marshall v. Marshall,
547 U.S. 293 (2006) 2, 3

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012) 15

Rupp v. Markgraf,
95 F.3d 936 (10th Cir. 1996) 11

Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401 (2011) 25

Seligson v. N.Y. Produce Exch.,
394 F. Supp. 125 (S.D.N.Y.1975) ..... *passim*

Tenn. Student Assistance Corp. v. Hood,
541 U.S. 440 (2004) 3

Travelers Indem. Co. v. Bailey,
557 U.S. 137 (2009) 3

Union Bank v. Wolas,
502 U.S. 151 (1991) 10, 21

Zahn v. Yucaipa Capital Fund,
218 B.R. 656 (D.R.I. 1998) 20, 33

Statutes

11 U.S.C. §103(d) 20, 21
11 U.S.C. §544(a) 9
11 U.S.C. §544(b) 10
11 U.S.C. §544(b)(1) 9
11 U.S.C. §545 9
11 U.S.C. §546(d) 22
11 U.S.C. §546(e) ..... *passim*
11 U.S.C. §547(b) 9, 32
11 U.S.C. §547(b)(1) 11, 12, 13, 25
11 U.S.C. §547(c) 12
11 U.S.C. §547(c)(2) 12
11 U.S.C. §548 11
11 U.S.C. §548(a)(1) 6, 13, 25
11 U.S.C. §548(a)(1)(A) 10
11 U.S.C. §548(a)(1)(B) 10
11 U.S.C. §548(a)(1)(B)(ii)(IV) 10
11 U.S.C. §548(c) 12
11 U.S.C. §550(a)(1) 12
11 U.S.C. §764(c) 18, 20, 21, 22, 23

11 U.S.C. §926(b) 25

Bankruptcy Act of 1867, ch. 176, §35, 14 Stat. 517 25

Bankruptcy Act of 1898, reprinted in Collier on Bankruptcy (James Wm. Moore et al. eds. 14th ed. 1978) 11, 13

Pub. L. No. 95-598, 92 Stat. 2549 (1978) 18, 20, 21

Pub. L. No. 97-222, 96 Stat. 235 (1982) 21, 22

Pub. L. No. 109-390, 120 Stat. 2692 (2006) 24

Uniform Fraudulent Transfer Act §§4(a), 5(a), 7A, pt. II U.L.A. 58 (2006) 11

Uniform Voidable Transactions Act §§4(a), 5(a), 7A, pt. II U.L.A. 20 (Supp. 2017) 11

Other Authorities

Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bkrtcy. L. Ltr. No. 7 (July 2017), ... *passim*

Collier on Bankruptcy (James Wm. Moore et al. eds., 14th ed. 1978) 11, 13, 25

24 Cong. Rec. 34,018 (1978) 22

Depository Trust and Clearing Corporation, *Understanding the Settlement Process*, http://www.dtcc.com/understanding-settlement/index.html 27

H.R. Rep. No. 97-420, reprinted in 1982 U.S.C.C.A.N. 583 ..... 20, 23, 28

Charles W. Mooney, Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When is Safe* Too *Safe?*, 49 Texas Int'l L.J. 245 (2014) 3

Mark J. Roe & Frederick Tung, Bankruptcy and Corporate Reorganization: Legal and Financial Materials (4th ed. 2016) 3, 30

S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787 ..... 17, 19

Frederick L. White, *The Commodity-Related Provisions of the Bankruptcy Act of 1978*, 34 Rec. Ass'n B. City N.Y. 262 (1979) 21

STATEMENT OF INTEREST[1]

Amici curiae are professors who have devoted their careers to teaching, studying and writing about bankruptcy law. Their scholarship focuses on the text, structure, legislative history, and policy objectives of the Bankruptcy Code, as well as on the practical economic impact of the bankruptcy system. Accordingly, *amici* have a strong interest in the correct interpretation of the Bankruptcy Code and the effective implementation of the public policies bankruptcy law is designed to promote.

The professors filing this brief are nationally and internationally recognized scholars, each of whom has participated as an *amicus* in prior cases involving foundational issues of bankruptcy law. The statutory provision at the center of this case, Bankruptcy Code §546(e), contains a safe harbor that prevents avoidance of a securities "settlement payment" or a transfer in connection with a "securities contract," unless the transfer at issue was an actual-intent fraudulent transfer. That safe-harbor provision was originally enacted in 1982 at the instance of the SEC, to protect the securities settlement and clearing process from what has become known as "systemic risk." Unlike the decision below, however, many courts have mistakenly applied the §546(e) securities safe harbor to protect transactions that pose no threat to the integrity of

---

[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no party or their counsel made any monetary contribution toward the preparation or submission of this brief.

the security settlement and clearance process. As a result, §546(e) has become a tool for considerable mischief with far-ranging ramifications. There is a wide array of securities industry transactions that §546(e) shields from avoidance; the transfer at issue in this case is not one of them. This case presents the Court with an opportunity to resolve the disagreements among the federal courts in a way that faithfully implements the statutory language and advances the sound policy objectives Congress intended.

Ralph Brubaker is the Carl L. Vacketta Professor of Law at the University of Illinois College of Law.[2] His prior *amicus* participation in this Court includes: *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); and *Marshall v. Marshall*, 547 U.S. 293 (2006). He is the author of a recent leading commentary on the statutory provision at issue in this case. Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bkrtcy. L. Ltr. No. 7, p. 1 (July 2017), available at *http://blogs.harvard.edu/bankruptctroundable/2017/09/05/understanding-the-scope-of-the-§-546e-securities-safe-harbor-through-the-concept-of-the-transfer-sought-to-be-avoided/*.

Bruce A. Markell is the Professor of Bankruptcy Law and Practice at the Northwestern University Pritzker School of Law. He has served as a

---

[2] Institutional affiliations are provided for identification purposes only.

bankruptcy judge for the District of Nevada and as a member of the Ninth Circuit's Bankruptcy Appellate Panel. His prior *amicus* participation in this Court includes: *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); and *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).

Charles W. Mooney, Jr. is the Charles A. Heimbold, Jr. Professor of Law at the University of Pennsylvania Law School. His prior *amicus* participation in this Court includes: *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158 (2015); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009); and *Marshall v. Marshall*, 547 U.S. 293 (2006). He is the author of an article that addresses the statutory provision at issue in this case. Charles W. Mooney, Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When is Safe* Too *Safe?*, 49 Texas Int'l L.J. 245 (2014).

Mark J. Roe is the David Berg Professor of Law at Harvard Law School, where he teaches and writes on bankruptcy, corporate law, financial markets, and financial institutions. He recently participated as an *amicus* in this Court in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017). He discusses the issue before the Court in this case in Mark J. Roe & Frederick Tung, Bankruptcy and Corporate Reorganization: Legal and Financial Materials 590-92 (4th ed. 2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

A key step in discerning the correct answer to a legal issue is asking the right questions. So, too, a key step in reaching a sound conclusion is employing the proper analysis. In this case, those keys can be found in understanding that the "transfer" is the textual analytical unit defining what the Bankruptcy Code authorizes to be avoided and for which §546(e) creates a safe harbor from avoidance.

In the decision below, the Seventh Circuit correctly perceived this basic point: "Chapter 5 [of the Code] creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place." Pet. App. 8. The "transfer" the trustee seeks to avoid is the unit of analysis for determining whether the §546(e) safe harbor shields that "transfer" from avoidance.

This analytical model is a familiar one in the law. Consider, for example, the various exceptions to the hearsay rule. Only if proffered evidence were hearsay in the first place would there be any reason to decide whether it fits within an exception. In short, exceptions apply only to matters covered by the rule.

Another analogy drawn from familiar legal principles illuminates the critical importance of identifying the correct unit of analysis. Consider the application of various categories of evidentiary privilege (*e.g.*, attorney-client, physician-patient,

clergy-congregant). Because the core analytical unit is the "communication," it is not enough simply to know the identities of the speaker and listener. Since not every communication by clients, patients, or congregants to their lawyers, doctors or religious leaders is privileged, proper analysis must focus first on whether the particular "communication" satisfies the criteria for protection.

In the context of the §546(e) safe harbor, merely identifying a securities market intermediary as a participant does not resolve the dispositive question whether a "transfer" is (or is not) protected from avoidance. The correct analytical path for this case is simple and direct. The Code authorizes certain "transfers" to be avoided. And the Code creates safe harbors that protect specified "transfers" from avoidance. Section 546(e) is one of those safe harbors. It prevents avoidance of a "transfer" that is a securities "settlement payment" or that is made in connection with a "securities contract."[3]

By its terms, §546(e) applies if the "transfer" sought to be avoided was allegedly "made by or to (or for the benefit of)" a protected securities market intermediary, such as a stockbroker or a financial institution. Accordingly, §546(e) shields a "transfer" from avoidance only if (1) that transfer was "made

---

[3] The applicability of the statutory terms "settlement payment" and "securities contract" is not at issue in this case. There is, however, considerable disagreement in the lower courts regarding whether particular challenged transfers are within the scope of these broadly defined, yet intractably vague, terms. This case presents no occasion for the Court to resolve that interpretive difficulty.

by" a debtor-transferor who was a qualifying intermediary, "or" (2) a party with potential liability—because the challenged transfer was allegedly made "to or for the benefit of" that party—was a protected intermediary.

That construction conforms to the statutory language and fits precisely within the Code's overall structure of avoidance liability and safe harbors. It also is fully consistent with the relevant legislative history. And it implements Congress' policy objectives in a rational, effective way.

The correctness of this approach is further reinforced by assessing the deleterious ramifications of decisions that have construed §546(e) in the way petitioner urges. Under the statutory interpretation offered by petitioner and its supporting *amici*, transfers can be inoculated from avoidance (*e.g.*, as a preferential or constructively fraudulent transfer) simply by inserting a qualified securities market intermediary as a conduit in the transactional chain. In that way, transfers that deplete the debtor's estate—transfers that should be avoided under the terms of the Code for the benefit of the debtor's unpaid creditors—are nonetheless immunized from the trustee's authorized reach. That mistaken interpretation, essentially a roadmap for laundering otherwise avoidable transfers through a financial institution acting as escrow or disbursing agent, is directly contrary to the system Congress enacted. In rejecting that approach, the Seventh Circuit correctly perceived the flaws in petitioner's proposed interpretation. The judgment below should be affirmed.

ARGUMENT

THE KEY TO UNDERSTANDING THE CORRECT SCOPE OF THE §546(e) SECURITIES SAFE HARBOR IS THROUGH THE CONCEPT OF THE "TRANSFER" THAT THE TRUSTEE SEEKS TO AVOID.

Section 546(e) of the Bankruptcy Code, 11 U.S.C. §546(e), creates an exception to a trustee's power to avoid and to recover for the benefit of creditors certain pre-bankruptcy transfers of property made by the debtor.

Code §546(e) (emphasis added), in relevant part, provides as follows:

> (e) Notwithstanding sections 544 [strong-arm and state-law avoidance powers], 545 [avoidance of statutory liens], 547 [preferential transfers], 548(a)(1)(B), and 548(b) [constructively fraudulent transfers] of this title, *the trustee may not avoid a transfer* that is a . . . settlement payment, as defined in section 101 or 741 of this title, *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, *or* that is *a transfer made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7) . . . that is made before

> the commencement of the case, except under section 548(a)(1)(A) [actual-intent fraudulent transfers] of this title.

The correct resolution of this case requires an accurate understanding of (1) the concept of a "transfer" as the fundamental transactional unit in the Bankruptcy Code's avoiding-power provisions and (2) the relationship between the concept of an avoidable "transfer" and the inextricably interrelated concepts of who that "transfer" is "made by or to (or for the benefit of)."

A. The Fundamental Transactional Unit in the Bankruptcy Code's Avoidance Provisions is a "Transfer."

The various avoiding-power provisions of the Code authorize a bankruptcy trustee to "avoid any *transfer* of an interest of the debtor in property" meeting defined criteria.[4] Section 101(54)(D) defines "transfer" broadly to mean "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property." That definition, however, does *not* specify the transactional unit that comprises the "transfer" the trustee can "avoid," particularly when the "transfer" is effectuated via multiple steps involving multiple entities. But the structure of the Code's avoiding-power provisions makes clear that, for analytical purposes, a "transfer" made "by" the debtor "to" a "transferee" is the fundamental and

---

[4] 11 U.S.C. §§544(b)(1) (giving trustee powers of individual creditors to avoid transfers under state law, *e.g.*, using state fraudulent transfer statutes), 547(b) (preferential transfers), 548(a)(1) (fraudulent transfers) (emphasis added). Some of the other avoiding powers alter the operative language slightly, but nonetheless still operate to avoid a "transfer" of property. *See, e.g.*, 11 U.S.C. §§544(a) (so-called strong-arm power to "avoid any *transfer* of property of the debtor"), 549(a)(1) (power to "avoid a *transfer* of property of the [bankruptcy] estate that occurs after the commencement of the case") (emphasis added). The power to avoid statutory liens is phrased in terms of "avoid[ing] the *fixing* of a statutory lien on property of the debtor." 11 U.S.C. §545 (emphasis added). Section 101(37) defines a "lien" as a "charge against or interest in property," and §101(54)(A) defines a "transfer" to include "the creation of a lien." The "fixing" of a statutory lien, therefore, is synonymous with "transfer" of a property interest.

pervasive transactional unit. Thus, the statutorily specified criteria regarding avoidability (or not, as in the case of the §546(e) securities safe harbor) are applied to that "transfer."

1. The Code's principal avoiding powers state that the "transfer" that can be avoided is a transfer "*of an interest of the debtor in property.*" *See* n.4, *supra*, and accompanying text. As this Court recognized in *Union Bank v. Wolas*, 502 U.S. 151, 152 (1991) (emphasis added) (citations omitted), this statutory language is simply a more elaborate, comprehensive expression that, for example, "Section 547(b) [the preferential transfer provision] of the Bankruptcy Code authorizes a trustee to avoid certain property transfers *made by a debtor* within 90 days before bankruptcy." *See also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994) (emphasis added) ("The constructive fraud provision at issue in this case [now Code §548(a)(1)(B)] applies to transfers *by* insolvent *debtors*").

That the Code's avoidance provisions operate on transfers made by a debtor is also explicitly acknowledged in the statutory criteria for avoidance of a transfer. For example, actual-intent fraudulent transfers are avoidable "if *the debtor* voluntarily or involuntarily *made such transfer* . . . with actual intent to hinder, delay, or defraud." 11 U.S.C. §548(a)(1)(A) (emphasis added). *See also* 11 U.S.C. §548(a)(1)(B)(ii)(IV) (emphasis added) (constructively fraudulent transfer avoidable "if *the debtor*, voluntarily or involuntarily, *made such transfer* to or for the benefit of an insider"). And the state-law avoidance power most commonly invoked via §544(b)

(including the case at bar) expressly applies only to "[a] transfer made . . . by a debtor."[5]

2. That the Code's avoiding-power provisions, by their terms, authorize avoidance of various "transfers" made "by" a debtor (as transferor) is straightforward and uncontroversial. The correlative concept embedded both in the structure of the statutory avoidance provisions and in the concept of a "transfer" as the fundamental transactional unit is, of course, that the avoidable "transfer" is one made "to" a "transferee." *See Rupp v. Markgraf*, 95 F.3d 936, 942 (10th Cir. 1996) (emphasis added) (citations

---

[5] This is the operative language of states' enactment of the Uniform Fraudulent Transfer Act (UFTA) (the state law avoidance power at issue in this case) and the 2014 Uniform Voidable Transactions Act (UVTA). UFTA §§4(a), 5(a), 7A, pt. II U.L.A. 58, 129 (2006); UVTA §§4(a), 5(a), 7A, pt. II U.L.A. 20, 29 (Supp. 2017).

The same was true under the explicit statutory language of the predecessor avoiding-power provisions of the Bankruptcy Act of 1898. *See* 1898 Act §60a(1), reprinted in 3, pt. 2 Collier on Bankruptcy 731 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter Collier (14th ed.)] (predecessor to Code §547 preference provision, stating that "[a] preference is a transfer, as defined in this Act ... made ... by [the] debtor" meeting specified criteria); 1898 Act §67d(2)-(3), reprinted in 4 Collier (14th ed.) at 5-6 (predecessor to Code §548 fraudulent transfer provision, applicable to "[e]very transfer made ... by a debtor" meeting specified criteria); 1898 Act §70e(1), reprinted in 4A Collier (14th ed.) at 5 (predecessor to Code §544(b)(1), applicable to "[a] transfer made ... by a debtor" voidable "under any Federal or State law applicable thereto"). The 1898 Act defined "transfer" broadly, in a fashion similar to the Code definition, as "every ... different mode, direct or indirect, of disposing of or of parting with property or with an interest therein." 1898 Act §1(30), reprinted in 1 Collier (14th ed.) at 44.2.

omitted) ("A transfer that may be avoided under the Bankruptcy Code takes place from the debtor *to* some entity . . . a transferee").

Identifying that "transferee" and the attendant circumstances surrounding the "transfer" made "by" the debtor "to" that "transferee" is critical in determining whether that "transfer" is avoidable. For example, "§547 allows a trustee to avoid a preferential *transfer* of assets by a debtor-transferor *to a creditor-transferee* if certain conditions are met." *In re Ogden*, 314 F.3d 1190, 1196 (10th Cir. 2002) (emphasis added). *See* 11 U.S.C. §547(b)(1) (authorizing avoidance of a preferential transfer "to ... a creditor"). And various §547(c) defenses to avoidance, such as the ordinary course of business defense of 11 U.S.C. §547(c)(2), also turn on identifying the "transferee" of that challenged "transfer." The same is true of the good-faith for-value defense for the "transferee" of a fraudulent "transfer." 11 U.S.C. §548(c).

3. If a transfer is avoided under any of the Code's avoidance provisions, the trustee "may recover ... the property transferred, or, if the court so orders, the value of such property from the initial transferee of such transfer *or* the entity *for whose benefit* such transfer was *made.*" 11 U.S.C. §550(a)(1) (emphasis added). The latter concept of beneficiary liability is also critical to understanding the meaning of the determinative "transfer made by or to (or for the benefit of)" scope language of §546(e).

Transfer "for the benefit of" liability is a very familiar idea in the law of avoidable transfers, as it has long been (and still is) embedded in the statutory cri-

teria for avoidance of a preferential transfer. Thus, Code §547(b)(1) provides that a "transfer" by a debtor can be an avoidable preferential transfer if it was made "to *or for the benefit of* a creditor." 11 U.S.C. §547(b)(1) (emphasis added).[6] Likewise, the Code's fraudulent transfer provision repeatedly invokes that same concept in referring to an avoidable "transfer to *or for the benefit of* an insider." 11 U.S.C. §548(a)(1) (emphasis added).

The Fourth Circuit succinctly explained the established meaning of transfer "for the benefit of" liability:

> The traditional examples of the "entity for whose benefit such transfer was made" are a debtor of the transferee or the guarantor of a debt owed by the bankrupt party to the transferee. In both cases, the *transfer* of an asset from the bankrupt party *to the transferee* extinguishes the liability of "the entity for whose benefit such transfer was made." Thus, we have described that entity as "'someone who receives the benefit but not the money.'"

In re Meredith, 527 F.3d 372, 375 (4th Cir. 2008) (emphasis added) (citations omitted) (quoting *In re Columbia Data Prods., Inc.*, 892 F.2d 26, 49 (4th Cir.

---

[6] The predecessor provision in the 1898 Act also provided that "a transfer ... of any of the property of a debtor ... made ... by such debtor" could be avoided if made "to *or for the benefit of* a creditor" preferred thereby. 1898 Act §60a(1) (emphasis added), reprinted in 3, pt. 2 Collier (14th ed.) at 731.

1989); *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 895 (7th Cir. 1988)).

4. Section 546(e) creates a safe harbor precluding avoidance of particular "transfers" and, in doing so, uses precisely the same terminology employed in the Code provisions it expressly references (which authorize avoidance of "transfers" made "by" a debtor "to" a transferee "or for the benefit of" a non-transferee). The symmetric consistency of the statutory language fits comfortably within the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (citation omitted).

The most natural reading of §546(e) is therefore clear: (1) if the challenged "transfer" allegedly (a) was made "by" a debtor-transferor who is a specified securities intermediary, "or" (b) was made "to" a "transferee" ("or for the benefit of" a non-transferee) who is a protected securities intermediary, and (2) that "transfer" was a settlement payment or was made in connection with a securities contract, then §546(e) provides a complete defense to avoidance of that challenged "transfer." *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (citation omitted).

Moreover, that the applicability of §546(e) can only be determined by reference to the actual "transfer" at issue in a particular case—*i.e.*, the "transfer" sought to be avoided—is clearly revealed

by the fact that §546(e) is a *safe harbor exemption* from the trustee's avoiding powers. Thus, §546(e) is introduced by a dependent "notwithstanding" clause explicitly cross-referencing those statutory avoiding powers. As this Court explained in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012): "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." Accordingly, the §546(e) safe harbor excepts from avoidance "transfers" that might otherwise be challenged under the avoiding-power provisions referenced in its "notwithstanding" clause.

There is no good reason to think that "transfer" as used in the §546(e) safe harbor should be construed to refer to something other than the actual "transfer" sought to be avoided under one of the statutory avoiding powers explicitly referenced in §546(e). If so construed, the safe harbor would function in a nonsensical fashion (*i.e.*, a safe harbor exemption shielding from avoidance a "transfer" that is *not* being challenged). Indeed, petitioner acknowledged to the Seventh Circuit that the trustee in this case is "seeking avoidance and recovery" of "transfers" made "by" debtor Valley View Downs "to" petitioner Merit Management as "initial transferee," neither of whom were qualifying §546(e)

intermediaries.[7] Yet petitioner simultaneously (and incongruously) argues that those same "transfers" are shielded from avoidance under §546(e) because they must be considered to have been made "by" and "to" the two conduit financial-institution intermediaries through which those "transfers" were effectuated.

The term "transfer" in §546(e) shields from avoidance an actual "transfer" that the estate representative seeks to avoid under one of the avoiding powers explicitly referenced in §546(e). Consequently, the associated phrase "made by or to (or for the benefit of)" should also carry the "transfer"-correlative meanings that those terms carry in the avoiding-power provisions. The Code authorizes avoidance of a "transfer" made "by" a debtor "to" a "transferee" if specified conditions regarding that transfer are met. If that transfer is avoided, the transferee "to" whom the transfer was made has liability, and if that transfer was made "for the benefit of" a non-transferee, that benefitted entity is also liable. By its express terms, therefore, §546(e) shields a challenged "transfer" from avoidance only if (1) that transfer was "made by" a debtor-transferor who was a qualifying securities intermediary, "or" (2) a party with potential liability—because the challenged transfer allegedly was made "to or for the

---

[7] *See* Brief of Defendant-Appellee at 5, *FTI Consulting, Inc. v. Merit Mgmt. Grp.*, 830 F.3d 690 (7th Cir. 2016) (No. 15-3388), 2016 WL 614281, at *5 ("Trustee filed suit against Merit Management ... *seeking avoidance and recovery of transfers [debtor] Valley View Downs made to [petitioner] Merit Management* in the amount of $16,503,850" (emphasis added)).

benefit of" that party—was a protected securities intermediary.

In this case, as petitioner has acknowledged, the trustee seeks "avoidance and recovery" of a "transfer" made "by" debtor Valley View Downs "to" petitioner Merit Management as "transferee" (*see* n.7, *supra*) and neither debtor-transferor nor petitioner-transferee were protected §546(e) intermediaries.[8] By the express terms of §546(e), therefore, the securities safe harbor has no applicability to the "transfer" sought to be avoided in this case.

B. Legislative History Confirms Congress' Determination that the "Transfer" Sought to be Avoided is the Transactional Unit to which the §546(e) Safe Harbor is Directed.

1. The predecessor to what is now §546(e) was enacted in 1978 as §764(c) of the new Bankruptcy Code and, as many courts have recognized, that safe harbor provision "was a response to the [1975] decision in *Seligson v. New York Produce Exchange*." *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 n.4 (10th Cir. 1990). *See* S. Rep. No. 95-989, at 106 (1978) (citing *Seligson v. N.Y. Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975)), reprinted in 1978 U.S.C.C.A.N. 5787, 5892. In *Seligson*, the trustee for a bankrupt commodities brokerage firm sought to avoid, as fraudulent transfers, margin payments the

---

[8] Moreover, neither petitioner nor respondent contends that the challenged "transfer" was made "for the benefit of" the two conduit financial institution intermediaries through which that transfer was effectuated.

debtor made to the clearing association for the commodities exchange on which the debtor executed commodities trades. Whether the margin payments were avoidable turned on "whether the defendant sought to be held liable [the clearing association] is indeed a *transferee* of the fraudulent transfer," and "[t]he Association's sole contention in this regard is that it was a mere 'conduit' for the transmittal of margins." 394 F. Supp. at 127-28, 135 (emphasis added).

Seligson held that genuine issues of material fact precluded summary judgment on the question whether the challenged margin payments were made *to* the clearing association as *transferee* or, alternatively, whether the clearing association could be disregarded as a "mere conduit" that can have no avoidance liability. *Id.* at 136. Accordingly, the court permitted the trustee's suit against the clearing association (alleging that the margin payments were made "to" the clearing association as "transferee") to proceed to trial. *Id.*

Uncertainty about the application of the "mere conduit" concept and the consequent prospect for avoidance liability as a "transferee" of margin payments prompted enactment of the initial avoidance safe harbor. That statutory safe harbor provided that "the trustee may *not* avoid a *transfer* that is a margin payment *to* . . . a commodity broker or forward contract merchant." Pub. L. No. 95-598, 92 Stat. 2549, 2619 (1978) (emphasis added) (enacting 11 U.S.C. §764(c)) (superseded in 1982 by 11 U.S.C. §546(e)).

This provision gave commodity brokers and forward contract merchants (FCMs) the same protection against avoidance liability (for margin payments they received) that is available to "mere conduits," who are not liable as "transferees" of an avoidable transfer. Moreover, this provision guaranteed that protection automatically, without the uncertainty, expense, and prospective liability associated with litigating "mere conduit" status (as illustrated by the *Seligson* case).

The rationale offered in the Senate Report confirms that the initial safe harbor was designed to give commodity brokers and FCMs automatic "mere conduit" protection against any avoidance liability for receipt of a commodity margin payment: "It would be unfair to permit recovery from an innocent commodity broker since such brokers are, for the most part, simply conduits for margin payments." S. Rep. No. 95-989, at 106, reprinted in 1978 U.S.C.C.A.N. at 5892. *See* Brubaker, *supra*, at 12 (quoting CFTC official's contemporaneous explanation). Indeed, the fees such brokers charge are miniscule relative to the dollar amount of the payments at issue, so one can fully appreciate Congress' desire to shield such intermediaries from avoidance liability for those payments, particularly given the importance of such market intermediaries to the proper functioning of the commodities markets.

The concern *Seligson* created and that the original safe harbor addressed was the prospect of avoidance liability as a "transferee" for specified market intermediaries. In creating a safe harbor

from liability for those intermediaries, the statute utilized the pervasive "transfer" concept as the analytical transaction unit for determining the avoidability (or not) of commodity margin payments—preventing avoidance if the "transfer" at issue was a commodity margin payment allegedly made "to" a commodity broker or FCM as "transferee." And, of course, if the trustee conceded that the margin payment was not made "to" a protected commodity broker or FCM as "transferee" (because the commodity broker or forward contract merchant was a "mere conduit," as the defendant argued in *Seligson*), then the safe harbor obviously would not apply because "true conduits . . . may not be subject to an avoidance recovery at all, thus rendering a [safe harbor] exception unnecessary." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676-77 n.31 (D.R.I. 1998) (citation omitted).

2. The original 1978 safe harbor also confirmed that the "transfer" sought to be avoided (and, thus, protected by the safe harbor) is *always* a transfer allegedly *made "by" the debtor*. As enacted in 1978, §103(d) provided as follows: "Subchapter IV of chapter 7 of this title [entitled Commodity Broker Liquidation] applies only in a case under such chapter concerning a commodity broker [as debtor] *except with respect to section 746(c)* [sic[9]] which applies to margin payments *made by any debtor* to a commodity broker or forward contract merchant."

---

[9] "The original reference in section 103(d) to 'section 746(c)' was a typographical error; the reference should have been to 'section 764(c).'" H.R. Rep. No. 97-420, at 3, reprinted in 1982 U.S.C.C.A.N. 583, 585.

Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C. §103(d)) (amended in 1982, in conjunction with the enactment of 11 U.S.C. §546(e), to repeal the "except" clause). That "except" clause was necessary for the 1978 safe harbor to have full effect in protecting the specified market intermediaries from all avoidance liability for margin payments they received.

As this Court has recognized, the Code's avoidance provisions "authorize[] a trustee to avoid certain property *transfers made by a debtor*." *Union Bank v. Wolas*, 502 U.S. 151, 152 (1991) (emphasis added). If the §764(c) safe harbor applied only in commodity broker liquidation cases, it would shield only margin payments made "by" commodity brokers (who subsequently file bankruptcy). But a major category of potential avoidance liability that the safe harbor sought to eliminate was "where the bankrupt is ... a customer of an FCM" or commodity broker who received the customer's prebankruptcy commodity margin payments. Frederick L. White, *The Commodity-Related Provisions of the Bankruptcy Act of 1978*, 34 Rec. Ass'n B. City N.Y. 262, 275 n.13 (1979). To protect transfers "made *by* a debtor" who was *not* a commodity broker, therefore, the safe harbor had to apply generally to commodity "margin payments *made by any debtor* to a commodity broker or forward contract merchant." Pub. L. No. 95-598, 92 Stat. at 2555 (emphasis added) (enacting 11 U.S.C. §103(d)) (amended in 1982, with the enactment of 11 U.S.C. §546(e), to repeal the "except" clause).

That particular statutory provision was rendered unnecessary by the 1982 amendment that moved the

safe harbor into the Chapter 5 provisions of general applicability to all bankruptcy cases. *See* Pub. L. No. 97-222, §2, 96 Stat. 235, 235 (1982) (repealing the "except" clause of §103(d)). Its continuing relevance flows from its clear confirmation that the avoidance safe harbor, from its very inception, operated on the same pervasive transactional unit as do all of the Code's avoidance provisions: a "transfer" made "by" a debtor as transferor "to" a "transferee." *See* 124 Cong. Rec. 34,018 (1978) (statement of Sen. DeConcini and Sen. Mathias) ("the intent of section 764 ... is to provide that margin payments ... previously *made by a bankrupt* to a commodity broker [or] forward contract merchant ... are nonavoidable transfers by the bankrupt's trustee" (emphasis added)).

3. In 1982, at the urging and with the support of the SEC, Congress expanded the avoidance safe harbor beyond the commodities markets, to protect specified securities intermediaries from avoidance liability for any "margin payment" or "settlement payment" they received, in a newly enacted §546(d) (now §546(e)) that replaced former §764(c). Pub. L. No. 97-222, §4, 96 Stat. at 236 (enacting §546(d)); *id.* §17(c), 96 Stat. at 240 (repealing §764(c)). This expanded safe harbor also broadened the scope of non-avoidable "transfers" to include not only those allegedly made "to" a protected commodities or securities intermediary as "transferee," but also any such "transfer" allegedly made "by" a specified intermediary who has filed bankruptcy. *Id.* §4, 96 Stat. at 236 (enacting §546(d)).

With respect to that latter expansion of the safe harbor, Congress understood that it would create the

potential for unacceptable "systemic risk" if a trustee could allege that any and all margin and settlement payments passing through the hands of a bankrupt commodity or securities firm were "transfers" made "by" the debtor firm, and thus potentially avoidable. To eliminate that risk, additional protection was "necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583. As the House Report explained, "[t]he Bankruptcy Code now expressly provides certain protections to the commodities market to protect against such a 'ripple effect.'... [F]or example, [Code §764(c)] prevents a trustee in bankruptcy from avoiding or setting aside ... margin payments made *to* a commodity broker." *Id.* (emphasis added) (citation omitted). The 1982 amendments, though, "*broaden* the commodities market protections" to also protect payments made *by* a bankrupt commodity broker "and expressly extend similar protections to the securities market." *Id.* at 2 (emphasis added).

No such "ripple effect" systemic risk is implicated when *neither* the debtor (whose trustee seeks to avoid and recover the "transfer" at issue made "by" the debtor) *nor* the defendant (from whom recovery is sought as alleged transferee "to" whom the "transfer" was made) is a protected market intermediary. Not coincidentally, therefore, the statutory language Congress chose in codifying the safe harbor, by restricting its effect to a "transfer" allegedly "made by or to" a qualifying market intermediary, makes

the safe harbor entirely inapplicable to such a "transfer."[10]

4. The 2006 amendment, which remains current and governs this case, provides further protection to a qualifying intermediary against avoidance liability in connection with a margin payment, settlement payment or securities contract transfer. Congress achieved this objective by amending the "transfer" made "by or to" scope provision of §546(e) to also include the familiar concept of transfer "for the benefit of" avoidance liability. Pub. L. No. 109-390, §5(b)(1)(A), 120 Stat. 2692, 2697 (2006) (amending §546(e)). Without this amendment, it is possible that even a "mere conduit" (who can have no liability for a transfer "to" the conduit as "transferee") nonetheless may have contingent guaranty liability in connection with the transfer (*e.g.*, by virtue of the system of guaranties involved in the securities settlement and clearing process), such that the conduit could face "for the benefit of" liability exposure in connection with the challenged "transfer."[11] In protecting qualifying intermediaries from such beneficiary liability, Congress employed "transfer" made "to or for the benefit of" language that replicated statutory text in the Code's existing avoidance provisions (*see*

---

[10] Petitioner's suggestion that the Court should simply ignore the 1982 legislative history regarding Congress' stated purpose in expanding the determinative scope phrase (to include any transfer made "by or to" a qualifying intermediary) is an implicit acknowledgement that petitioner's interpretation would give the securities safe harbor an immensely more expansive sweep than Congress intended.

[11] *See* Brubaker, *supra*, at 14 & nn.101, 102.

11 U.S.C. §§547(b)(1), 548(a)(1)) and even an existing avoidance safe harbor (*see* 11 U.S.C. §926(b) (enacted in 1988, significantly, well *before* the 1996 *Munford* and *Healthco* decisions discussed *infra*, p.31)).[12]

Viewing the Code's avoidance provisions as a whole, the "for the benefit of" language (added to §546(e) in 2006) refers to the firmly established concept of transfer "for the benefit of" avoidance liability. And Congress' addition of that "transfer" liability language reinforces the natural reading of §546(e)'s pre-existing "transfer made by or to" language as transferor and transferee references, in accordance with the canon of *noscitur a sociis* ("it is known by its associates"). *See, e.g., Deal v. United States*, 508 U.S. 129, 132 (1993) ("fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation but must be drawn from the context in which it is used"); *see also Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 409 (2011); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

There is ultimately only one plausible explanation for the 2006 amendment to the §546(e)

---

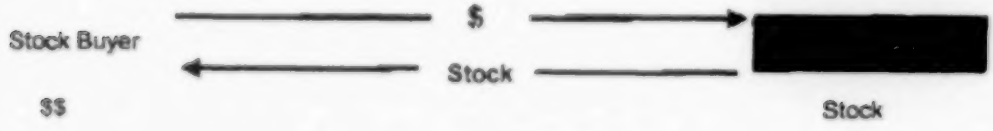
[12] The conjectural argument of petitioner and its supporting *amici* that attributes a contrary, highly idiosyncratic meaning to this "for the benefit of" language, based on the assumption that Congress secretly intended to overrule *Munford* and *Healthco*, ignores the long-established meaning of such transfer "for the benefit of" language, which has been expressly codified in bankruptcy avoidance law since the Bankruptcy Act of 1867. *See* Brubaker, *supra*, at 8, 14-15; Bankruptcy Act of 1867, ch. 176, §35, 14 Stat. 517, 534, reprinted as cumulatively amended in 10, pt. 2 Collier (14th ed.) at 1768.

safe harbor: that amendment protects qualifying intermediaries from "for the benefit of" avoidance liability in connection with a challenged "transfer" that is a margin payment, settlement payment or securities contract transfer, consistent with the accepted meaning of the phrase "for the benefit of" throughout the Code's avoidance provisions.

C. Congress' Intended Scope for the §546(e) Securities Safe Harbor

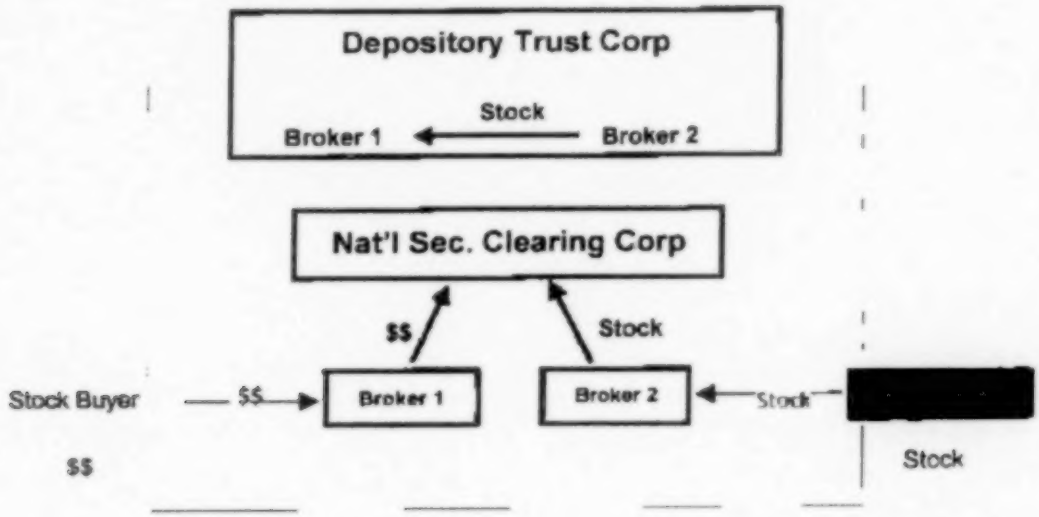
To understand why Congress enacted the §546(e) securities safe harbor and the scope thereof, as revealed by the statutory text and as confirmed by legislative history, it is helpful to consider a typical transaction involving a purchase and sale of stock, effectuated through the securities settlement and clearing system.

When a buyer purchases stock from a seller, the buyer transfers money to the seller, and the seller transfers the stock to the buyer.



These transactions do not typically occur face-to-face; the buyer and seller transact through the securities settlement and clearing system. The buyer sends cash to a securities broker; the seller moves the stock from its broker to the buyer's broker. These transactions between the buyer's and the seller's brokers are cleared by specialized institutions, typi-

cally the National Securities Clearing Corporation and the Depository Trust Corporation.[13]



The brokers who are the conduits for the securities and the cash are not highly compensated for their work, in terms of fees as a percentage of the value of the stock being purchased and sold. Congress' judgment was that the securities settlement and clearing system is a critical component of American financial infrastructure that should not be undermined. Thus, intermediaries who move securities and money to effectuate the purchase-and-sale transaction should not face any exposure for potential avoidable-transfer liability.

---

[13] The graphical presentation in the text is a simplified portrayal of the mechanisms by which stock and money are exchanged between Stock Buyer and Stock Seller. For more detailed information about the settlement and clearing process, see Depository Trust and Clearing Corporation, *Understanding the Settlement Process*, http://www.dtcc.com/understanding-settlement/index.html (last visited Sept. 13, 2017).

One of Congess' concerns, phrased in terms of "ripple effect" systemic risk in the 1982 legislative history, is that a bankruptcy filing by one of the conduit intermediaries (*e.g.*, Broker 1) could subject *all* settlement payments passing through the hands of Broker 1 during the period preceding the bankruptcy filing to potential challenge as avoidable "transfers" made "by" Broker 1. And since many of those payments would have also passed through the hands of other market intermediaries, suits to avoid Broker 1's settlement payments could target other intermediaries for massive liability, posing the risk of "the insolvency of one ... security firm ... spreading to other firms and possibly threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1, reprinted in 1982 U.S.C.C.A.N. at 583. The §546(e) securities safe harbor prevents Broker 1's bankruptcy trustee from pursuing avoidance actions based on such an allegation.

Congress' other closely-related concern, highlighted by the *Seligson* case, is that a bankruptcy filing by any of the entities involved in the purchase-and-sale transaction (*e.g.*, Stock Buyer) could subject a conduit intermediary (*e.g.*, Broker 2) to avoidable-transfer liability exposure. If Stock Buyer's bankruptcy trustee sues Broker 2 alleging that Stock Buyer made an avoidable "transfer *to*" Broker 2 as "transferee," the §546(e) securities safe harbor ensures that Broker 2 can obtain dismissal of the trustee's claim *without* having to litigate the issue of

"mere conduit" versus "transferee."[14] And after the 2006 amendment to §546(e), Broker 2 has the same protection against an allegation that Stock Buyer made an avoidable transfer "for the benefit of" Broker 2.

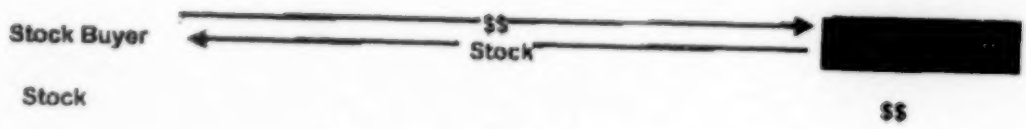
In contrast to those cases within the intended scope of the §546(e) securities safe harbor, consider a suit by Stock Buyer's trustee alleging that Stock

---

[14] Petitioner and its *amici* make repeated arguments that since qualifying §546(e) intermediaries (such as clearinghouses) are nearly always "mere conduits"—who cannot be either transferor or transferee of a challenged transfer—it makes no sense for the safe harbor to apply only in cases where a §546(e) intermediary *is, in fact,* a transferor or transferee of the challenged transfer.

Petitioner and its supporting *amici* fail to grasp the purpose and function of a *safe harbor,* a failing also revealed by their emphatic reminders that the standards for whether an intermediary will be considered a "mere conduit" or a "transferee" were not fully developed when the safe harbor was enacted (and, indeed, are still highly indeterminate). *See* Brubaker, *supra,* at 6-7, 11-12. That is true and precisely the reason why a safe harbor was necessary (as demonstrated by the *Seligson* case, involving a clearinghouse defendant). The function of the safe harbor is *not* to prevent avoidance only where a §546(e) intermediary *is, in fact,* determined to be a transferor or transferee of a challenged transfer *after* litigating "mere conduit" status; the safe harbor absolutely prevents avoidance of a transfer based on *an allegation* that a §546(e) intermediary was a transferor or transferee of the challenged transfer (such as the allegation in *Seligson*) *without* any litigation of "mere conduit" status. *See Kaiser Steel Corp. v. Charles Schwab & Co.,* 913 F.2d 846, 848 (10th Cir. 1990) (refusing to address the "mere conduit" issue because the appellant securities broker was protected from *alleged* "transferee" liability by the §546(e) safe harbor); *see also* Brubaker, *supra,* at 15-16.

Buyer made an avoidable "transfer *to*" Stock Seller (analogous to the trustee's allegation in this case).



In that case, neither of Congress' concerns regarding protection of the securities market is implicated. There is no reason for the securites safe harbor to protect that "transfer" from avoidance, and it does not. The "transfer" sought to be avoided is not alleged to have been "made by or to (or for the benefit of)" a protected intermediary. *See generally*, Roe & Tung, *supra*, at 590-92.

D. The Seventh Circuit's Interpretation of §546(e) is the Only Rational and Practical Reading that Conforms to the Statute's Plain Meaning and Congressional Intent.

The essence of the Seventh Circuit's holding in the decision below—and of the cases on which that holding principally relied, *In re Munford, Inc.*, 98 F.3d 604, 609-10 (11th Cir. 1996) and *In re Healthco Int'l, Inc.*, 195 B.R. 971, 981-83 (Bankr. D. Mass. 1996)—is that the applicability of the §546(e) securities safe harbor cannot be determined in the abstract, but rather, can only be determined by reference to the "transfer" sought to be avoided.

In contrast, some courts have interpreted the scope of the §546(e) safe harbor in ways that neither adhere to the express terms of the Code, nor promote the salutary policy objectives Congress sought to achieve. Instead, those decisions create the risk of substantial economic mischief. The flaws in those prior decisions confirm the need to read §546(e)'s scope phrase as referring to the "transfer" sought to be avoided.

1. Unlike the more discerning opinions in *Munford, Healthco* and the decision below, the Second, Third, Sixth, and Eighth Circuits have instead viewed the text of §546(e) in isolation, relying on an invocation of "plain" meaning, but without engaging the operative statutory language. *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 338-39 (2d Cir. 2011); *In re Quebecor World (USA), Inc.*, 719 F.3d 94, 98, 99-100 (2d Cir. 2013); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515-16 (3d Cir. 1999); *In re Plassein Int'l*

Corp., 590 F.3d 252, 257-58 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545, 550-51 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986-87 (8th Cir. 2009). Those decisions ultimately run counter to a common-sense reading of the statutory language and established canons of statutory construction.

As a result, those courts have construed the §546(e) safe harbor in an indefensible fashion, which is apparent in their inconsistent descriptions of the "transfer" at issue. For example, in *Quebecor World*, the Second Circuit acknowledged that "transfers" at issue (which the creditors' committee "sought to avoid and recover") were "certain payments *made by debtor* Quebecor World (USA) Inc. *to* the appellee noteholders" who were "*not* financial institutions." 719 F.3d at 96, 99 (emphasis added).[15] Nonetheless, the court simultaneously stated that "this was a *transfer made to* a financial institution," CIBC Mellon, the disbursing agent for the noteholders. *Id.* at 99. But as the court's prior inconsistent description of the "transfer" at issue indicated, the committee was not seeking to avoid any transfer "to"

---

[15] *See also In re Quebecor World (USA) Inc.*, 453 B.R. 201, 204, 212 (Bankr. S.D.N.Y. 2011) ("It is undisputed that these substantial payments were *made by [debtor]* QWUSA *to* the Noteholders ... within the ninety day period" before bankruptcy, as required by Code §547(b), which "provides that the trustee of a bankruptcy estate may recover ... money or property *transferred by an insolvent debtor* in the ninety days preceding bankruptcy, where the *transfer* (1) was *made to* ... a creditor") (emphasis added), *aff'd*, 480 B.R. 468 (S.D.N.Y. 2012), *aff'd*, 719 F.3d 94 (2d Cir. 2013).

CIBC Mellon (and thus subject CIBC Mellon to avoidance liability) because the Committee acknowledged that "CIBC Mellon was merely a conduit." *Id.*[16]

By its inconsistent assumptions regarding the "transfer" at issue, then, the Second Circuit purported to apply §546(e) to shield from avoidance a "transfer" ("to" CIBC Mellon) that was *not* being challenged and that *no one* alleged had even been made. As one court aptly noted, "true conduits" like CIBC Mellon "may not be subject to an avoidance recovery at all, thus rendering a §546(e) exception unnecessary." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676-77 n.31 (D.R.I. 1998). And, of course, the effect of the Second Circuit's confusion over the "transfer" at issue is pernicious because it obliquely extends the safe harbor of §546(e) to a "transfer" (*not* made "to" a financial institution) that the statute, by its explicit terms, does *not* protect.[17]

2. There is no merit to the efforts of petitioner and its supporting *amici* to bolster the Second (and other) Circuits' interpretation of the "transfer made

---

[16] The bankruptcy court in that case made a similar self-contradictory assertion: "In determining that *the transfer in question* [*see* n.15, *supra*] qualifies for the [§546(e)] exemption, the Court must find that [it] has been *made to* a 'financial institution' .... [W]ithout question the Disputed Transfer was 'made ... to ... a ... financial institution,' *i.e.*, CIBC Mellon as trustee for the Notes." 453 B.R. at 212 (emphasis added).

[17] Other courts adopting the same "plain"-meaning interpretation of §546(e) exhibit the same vacillation regarding the "transfer" at issue. *See* Brubaker, *supra*, at 10 & n.78. And so does petitioner in this case. *See* n.7, *supra*, and accompanying text.

by or to (or for the benefit of)" scope language of §546(e). The argument they advance makes no sense.

For, example, petitioner's principal textual argument (echoed by petitioner's *amici*) is that interpreting "by or to (or for the benefit of)" in accordance with the "transfer"-correlative meanings those words carry throughout the Code's avoidance provisions would introduce surplusage into that phrase, supposedly rendering the "or for the benefit of" language (added in 2006) a superfluous amendment with no independent meaning or purpose. That argument is incorrect.

Under the natural "transfer"-correlative reading of the determinative scope phrase, the securities safe harbor applies when the "transfer" sought to be avoided allegedly (1) was "made by" a debtor-transferor who was a qualifying intermediary, "or" (2) was made "to" a protected intermediary as "transferee," "or" (3) was made to a transferee that was *not* a protected intermediary, but was nonetheless made "for the benefit of" a protected intermediary (*e.g.*, because the intermediary had contingent guaranty liability in conjunction with the transfer). Under the established, accepted meaning of transfer "for the benefit of" liability, "the categories 'transferee' and 'entity for whose benefit such transfer was made' are mutually exclusive." *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 896 (7th Cir. 1988). Thus, by definition, the "transfer"-correlative interpretation of §546(e)'s determinative scope phrase gives independent meaning, content, and applicability to each of the disjunctive prepositions within the

compound prepositional phrase "by or to (or for the benefit of)."

In truth, it is petitioner's proposed interpretation that would inject inexplicable surplusage into §546(e)'s determinative scope phrase. Petitioner's surplusage argument depends on petitioner's highly implausible assumption (*see* n.12, *supra*) that the phrase "for the benefit of" in §546(e) does not have the established meaning that phrase carries throughout the rest of the Code's avoidance provisions (and has carried for more than 100 years). Rather, petitioner assumes (without explication) that §546(e) uses the phrase "for the benefit of" to refer to cases where a qualifying intermediary is alleged to be the *transferor or transferee* of a challenged transfer.[18] If that were true, so the argument goes, then by reading the "by or to" phrase to *also* be referring to cases where a qualifying intermediary is alleged to be the *transferor or transferee* of a challenged transfer (per the "transfer"-correlative interpretation of "by or to"), redundant surplusage would exist.

Of course, if petitioner's foundational assumption regarding the meaning of §546(e)'s "for the benefit of" phrase is incorrect, petitioner's surplusage argument collapses. Even more damning, if one were to accept petitioner's implausible reading of the "for the benefit

---

[18] At times, petitioner seems to take the position that this "for the benefit of" phrase refers to cases where a §546(e) intermediary is alleged to be the *transferee* of the challenged transfer. Petitioner's interpretation is equally problematic whether "for the benefit of" is assumed to refer only to a §546(e) intermediary as alleged transferee or also as alleged transferor.

of" phrase, it would introduce precisely the surplusage that petitioner decries.

Petitioner's proposed interpretation can avoid redundant surplusage *only if* the phrase "by or to" is *not* referring to cases where a qualifying intermediary is alleged to be the transferor or transferee of a challenged transfer; *viz.*, "by or to" refers *only* to cases like this one, where everyone concedes that qualifying intermediaries were involved as "mere conduits." That, of course, places petitioner in the untenable position of arguing that the phrase "transfer made by or to" is *not* referring to the *transferor or transferee* of that transfer; *i.e.*, a "transfer" is *not* made "by" the transferor and is *not* made "to" the transferee of that transfer. That argument is incompatible with petitioner's claim to be reading the text according to its plain, ordinary meaning, so petitioner never makes that aspect of its surplusage argument explicit. Petitioner's supporting *amici*, however, acknowledge that the phrase "transfer made by or to" includes within its scope the transferor and transferee of that "transfer."[19] If that is true, which it surely is, then reading the phrase "for the benefit of" as referring to the *transferor or transferee* of a challenged transfer (per the interpretation posit-

---

[19] Brief for Various Former Tribune and Lyondell Shareholders as *Amici Curiae* in Support of Petitioner, at 12. *See also Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 848 (10th Cir. 1990), *aff'g* 110 B.R. 514, 516 (D. Colo.) (holding that "even if [the appellant broker] can be considered an initial transferee, [it] is ... nevertheless protected [from avoidance liability] by [Code] §546(e), which exempts 'settlement payments' made *to* brokers from recovery as a [constructively] fraudulent conveyance" (emphasis added)).

ed by petitioner and its *amici*) creates redundant surplusage between the phrases "by or to" and "for the benefit of."

Petitioner's proposed interpretation of the determinative "transfer made by or to (or for the benefit of)" scope phrase of §546(e) is contrary to the accepted meaning of that language throughout the Code's avoidance provisions. For altogether valid and compelling reasons, therefore, the Seventh Circuit in the decision below rejected the statutory construction proffered by petitioner. Pet. App. 13. This Court should also reject that interpretation, which conflicts with the express language, structural context, and congressional objectives of §546(e). A decision that correctly recognizes that the "transfer" sought to be avoided is the analytical transaction unit will chart the proper path for implementing §546(e) as its language requires and as Congress intended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JERROLD J. GANZFRIED
Counsel of Record
GANZFRIED LAW
5335 Wisconsin Ave., NW
Suite 440
Washington, DC 20015
(202) 486-2004
JJG@ganzfriedlaw.com

Counsel for Amici Curiae

September 18, 2017

RECORD AND BRIEFS

FILED
SEP 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-784

In the Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,
Petitioner,

v.

FTI CONSULTING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF RESPONDENT

Bradford J. Sandler
Counsel of Record
Dean A. Ziehl
Harry D. Hochman
PACHULSKI STANG ZIEHL & JONES
10100 Santa Monica Boulevard
Suite 1300
Los Angeles, California 90067
Telephone: (310) 277-6910
bsandler@pszjlaw.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Section 546(e) Does Not Bar Avoidance of the Transfer From Valley View to Merit 4

A. Congress Intended Trustees to Have the Power to Avoid Precisely This Type of Constructively Fraudulent Transfer 4

B. The Statutory Text and Context Do Not Support Merit's Overexpansive Construction of Section 546(e) 8

C. The Interplay Between Sections 546(e) and 550 Demonstrates That Merit's Analytical Construct Runs Counter to Congressional Intent 10

II. This Case Should Not Be Decided on the Basis of its Implications for Failed Leveraged Buyouts of Large Public Corporations 13

A. Leveraged Buyouts Have Exactly the Type of Pernicious Effect on Unsecured Creditors That the Bankruptcy Code Was Intended to Address 14

B. There is No Evidence That Congress Intended Section 546(e) to Advance the Behavioral Economics Policies Postulated by *Amici* 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Bank of America Nat. Trust & Sav. Assn. v. 203 North LaSalle Street P'ship, 526 U.S. 434 (1999) 15

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 5, 6

Bonded Fin. Serv., Inc. v. European Am. Bank, 838 F.2d 890 (7th Cir. 1988) 12

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2016) 15

Dzikowski v. N. Trust Bank of Fla., N.A. (In re Prudential of Fla. Leasing Inc.), 478 F.3d 1291 (11th Cir. 2007) 4

FTC v. Mandel Bros. Inc., 359 U.S. 385 (1959) 10

FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690 (7th Cir. 2016) 10

Gustafson v Alloyd Co., 513 U.S. 561 (1995) 10

Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) 22

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) 9

Jewel Recovery, L.P. v. Gordon (In re Zale Corp.), 196 B.R. 348 (N.D. Tex. 1996) 5

Mellon Bank, N.A. v. Metro Commc'ns,
945 F.2d 635 (3d Cir. 1991) 17

Northern Pac. R. Co. v. Boyd,
228 U.S. 482 (1913) 15

Official Comm. v. Fitzsimons (In re Tribune Co.),
No. 10-54010 (Bankr. D. Del. Nov. 1, 2010) ... 18

Seligson v.New York Produce Exch.,
394 F. Supp. 125 (S.D.N.Y. 1975) 12

State Bank v. Covey (In re Duckworth),
776 F.3d 453 (7th Cir. 2014) 4

Union Bank v. Wolas,
502 U.S. 151 (1991) 4

Weisfelner v. Fund 1 (In re Lyondell Chem. Co.),
503 B.R. 348 (Bankr. S.D.N.Y. 2014) 13, 22

Whitman v. American Trucking Assns., Inc.,
531 U.S. 457 (2001) 21

Zahn v. Yucaipa Capital Fund,
218 B.R. 656 (D.R.I. 1998) 21, 22

STATUTES

11 U.S.C. § 544 4

11 U.S.C. § 544(a) 9

11 U.S.C. § 545 9

11 U.S.C. § 546(e) ..... *passim*

11 U.S.C. § 547 4

11 U.S.C. § 547(b) 9

11 U.S.C. § 548 ..... 4, 9

11 U.S.C. § 548(a)(1)(B) 6

11 U.S.C. § 549 9

11 U.S.C. § 550 ..... 9, 10, 11, 12

11 U.S.C. § 550(a)(1) 11

11 U.S.C. § 550(a)(2) 11

11 U.S.C. § 550(b) 11

11 U.S.C. § 1129(b)(2) 15

Bankruptcy Act of July 1, 1898, ch. 541, § 67(e), 30 Stat. 564-565, *codified at* 11 U.S.C. § 746(c) (repealed 1982) 5

Pub. L. No. 95-598, 92 Stat. 2549 (1978) 12

OTHER AUTHORITIES

Ulf Axelson, Tim Jenkinson, Per Stromberg & Michael Weisbach, Borrow Cheap, Buy High? The Determinants of Leverage and Pricing in Buyouts 32 (Nat'l Bureau of Econ. Research, Working Paper No. 15952, 2010), available at http://www.nber.org/papers/wl5952 17

Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships Before the Subcomm. on Admin. Oversight and the Courts and the Comm. on the Judiciary, 105th Cong. 1 (1997) 5

Ralph Brubaker, *Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bankr. L. Letter, July 2017 9

Orlando F. Bump, Fraudulent Conveyances, *Fraudulent Conveyances: A Treatise Upon Conveyances Made by Debtors to Defraud Creditors* 86 (1872) 6

5-548 *Collier on Bankruptcy* (16th ed. 2017) 6

13 Eliz., ch. 5 (1571) 5

John H. Ginsberg et al., *Befuddlement Betwixt Two Fulcrums: Calibrating the Scales of Justice to Ascertain Fraudulent Transfers in Leveraged Buyouts*, 19 Am. Bankr. Inst. L. Rev. 71 (2011) 17, 18

H.R. Rep. No. 95-595 (1977) 4, 5

H.R. Rep. No. 97-420 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583 ..... 19, 20

H.R. Rep. No. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 21

Peter A. Hunt, *Structuring Mergers & Acquisitions 101*, 293 (4th ed. 2009) 16, 17

Steven N. Kaplan & Per Stromberg, *Leveraged Buyouts and Private Equity*, 23 J. Econ. Perspectives 121 (2009) 15, 16, 17, 19

Samir D. Parikh, *Saving Fraudulent Transfer Law*, 86 Am. Bankr. L.J. 305 (2012) 16, 20

Report of the Comm'n on the Bankruptcy Laws of the United States, H. R. Doc. No. 93–137 (1973) 15

Report of Kenneth N. Klee, As Examiner, *In re Tribune Co.*, No. 08-13141, Vol. 1 (Bankr. D. Del. Aug. 3, 2010) 18

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 12

INTEREST OF AMICUS CURIAE

The National Association of Bankruptcy Trustees ("NABT") is a nonprofit association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country and to promote the effectiveness of the bankruptcy system as a whole.[1] There are currently approximately 1,200 bankruptcy trustees receiving new cases, of whom nearly 1000 are NABT members.

A fundamental duty of bankruptcy trustees is to maximize the assets available for distribution to a bankrupt debtor's creditors. One of the most powerful tools given by Congress to trustees (or other estate representatives) to achieve that objective is the power to avoid and recover certain pre-bankruptcy transfers by a debtor, including those that place assets outside the reach of its creditors or that have the effect of preferring one creditor over another.

This appeal addresses an enormously important application of that power. For over a hundred years, creditors have been able to avoid transfers made by a debtor without receiving fair consideration when the transfer leaves the debtor unable to pay those creditors, whether or not there was any intent to defraud them. A debtor must be just before she is generous. A trustee's ability to recover a constructively fraudulent transfer is often the creditors' only hope for

---

[1] Undersigned counsel for NABT authored this brief in its entirety; no other person or entity has made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the submission of amicus curiae briefs has been lodged with the Clerk of the Court.

a meaningful recovery, and the Court's decision will have a dramatic effect on the ability of *Amicus'* members to achieve that central objective of the Bankruptcy Code.

SUMMARY OF ARGUMENT

Under Petitioner's construction of section 546(e) of the Bankruptcy Code, 11 U.S.C. § 546(e), a trustee may not exercise the Code's power to avoid injudicious transfers by an insolvent debtor when the transfer to be avoided involves a security, no matter the disparity between value and consideration, because every such transfer invariably involves a financial institution. The exception would apply whether the sale involves stock in a family-owned company or publicly-traded corporation, and whether the parties are neighbors or hedge funds, so long as they use a bank.

The ability to avoid constructively fraudulent transfers is a century-old, indispensable tool for restoring funds to a depleted bankruptcy estate. It is often the sole effective remedy available to a trustee. The transfer from Valley View to Merit Management in this case is exactly the type of constructively fraudulent transfer that Congress gave trustees the power to avoid in Chapter 5 of the Code. Neither the text nor the statutory context of § 546(e) support the conclusion that it was intended to eliminate that right anytime the transfer involves a sale of stock. Its legislative history, in tandem with the most basic canons of statutory interpretation, demonstrates that Merit's application of the statute is not what Congress intended.

Importantly, Merit's § 546(e) exclusion would prevent a trustee from attempting to unwind a failed leveraged buyout, even when it is a purely private transaction, as most are. Encumbering a company's assets to finance its own acquisition poses a unique hazard to unsecured creditors. Leverage greases the wheels of such transactions, enabling buyers to offer a hefty premium to controlling shareholders while minimizing their own capital costs and greatly increasing their potential investment return. The company skates on a thin margin until the contemplated disposition event. Unsecured creditors are left to bear the risk that the company will sink under the weight of its new debt load, as some inevitably do.

When controlling shareholders are cashed out by pushing the company into insolvency, the Bankruptcy Code permits a trustee to avoid and recover those transfers. Nothing in the legislative history of § 546(e) suggests that Congress intended to insulate the ultimate recipients of such transfers from liability so long as they use a bank rather than gold bar or a briefcase full of cash. Congress' concern was the integrity of the public securities clearance system, not shareholders' investment expectations and calculations. The plain language of § 546(e), its statutory context and its purpose all support the Seventh Circuit's sensible construction. Its decision should be affirmed.

ARGUMENT

I. Section 546(e) Does Not Bar Avoidance of the Transfer From Valley View to Merit

A. Congress Intended Trustees to Have the Power to Avoid Precisely This Type of Constructively Fraudulent Transfer

1. "A bankruptcy trustee is tasked with maximizing the recovery of unsecured creditors." *State Bank v. Covey (In re Duckworth)*, 776 F.3d 453, 458 (7th Cir. 2014). To that end, Congress armed the trustee with the power to avoid and recover for the benefit of creditors certain types of transfers made by a debtor before the bankruptcy case commenced. The trustee's avoidance power "prevents the depletion of the estate, promotes an equitable distribution of the debtor's assets, and protects creditors who advanced credit in ignorance of fraud." *Dzikowski v. N. Trust Bank of Fla., N.A. (In re Prudential of Fla. Leasing Inc.)*, 478 F.3d 1291, 1299 (11th Cir. 2007).

Those powers, contained in Chapter 5 of the Bankruptcy Code, include the right under section 547 to avoid transfers that result in the preference of one creditor over another, the right under section 548 to avoid fraudulent transfers of a debtor's property, and the trustee's so-called "strong arm" power under section 544, which gives a trustee the rights of a hypothetical lien creditor or good-faith purchaser as of the petition date. 11 U.S.C. §§ 544, 547 & 548. A fundamental goal of a trustee's avoiding powers is to "'facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (quoting H.R.

Rep. No. 95-595 at 177-78 (1977)). Put differently, "Congress determined that a few individuals should not be allowed to benefit from transfers by an insolvent entity at the expense of the many." *Jewel Recovery, L.P. v. Gordon (In re Zale Corp.)*, 196 B.R. 348, 352 (N.D. Tex. 1996).

2. Perhaps the most important of these powers from the standpoint of equity and compensation of creditors is the right to avoid and recover prepetition transfers made by an insolvent debtor without receiving fair consideration, to the prejudice of its creditors. It is "longstanding bankruptcy policy—inherited by this nation at its founding and dating back to England's Statute of Elizabeth, enacted in 1571—that insolvent debtors should not be able to evade their financial commitments by making gifts."[2] This statute provided that a conveyance made "to the End, Purpose and Intent to delay, hinder or defraud creditors" is voidable. 13 Eliz., ch. 5 (1571). "Every American bankruptcy law has incorporated a fraudulent transfer provision; the 1898 Act specifically adopted the language of the Statute of Elizabeth." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 (1994); *see* Bankruptcy Act of July 1, 1898, ch. 541, § 67(e), 30 Stat. 564-565 (adopting statutory language).

---

[2] *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships Before the Subcomm. on Admin. Oversight and the Courts and the Comm. on the Judiciary*, 105th Cong. 1 (1997) (prepared statement of Donald S. Bernstein on behalf of the National Bankruptcy Commission).

A transfer made for inadequate consideration by an insolvent debtor was among the "badges of fraud" raising a rebuttable presumption of fraudulent intent. "A vendee who purchases the property of an insolvent debtor for less than its value thereby deprives the creditors of the difference, and defeats their just expectations." Orlando F. Bump, Fraudulent Conveyances, *Fraudulent Conveyances: A Treatise Upon Conveyances Made by Debtors to Defraud Creditors* 86 (1872). From this evolved the concept of "constructive fraud," in recognition of the fact that creditors suffer harm when a debtor transfers property for less than fair consideration, even without actual fraudulent intent, at a time when the debtor is insolvent or when the debtor becomes insolvent due to the transfer. This concept was incorporated in the Uniform Fraudulent Conveyance Act, drafted in 1918, and absorbed into federal bankruptcy law in 1938 through provisions of the Chandler Act. *See generally BFP*, 511 U.S. at 540-41; 5-548 *Collier on Bankruptcy* ¶ 548.01 (16th ed. 2017).

Section 548(a)(1)(B) of the Code carries forward this important creditor remedy. A trustee may avoid a transfer by the debtor of an interest in property for less than "reasonably equivalent value," made while the debtor was insolvent or that rendered the debtor insolvent, or that left the debtor with "unreasonably small capital" to engage in a business or transaction, or unable to pay contemplated debts as they came due. Section 546 limits the trustee's ability to avoid such constructively fraudulent transfers. Relevant here, a trustee "may not avoid" a "transfer" that is a "settlement payment ... made by or to (or for the

benefit of)" a financial institution or other enumerated entity. 11 U.S.C. § 546(e).

3. To a bankruptcy trustee charged with maximizing the value of the estate, the successful administration of Valley View's bankruptcy case turns on the prosecution of what is or should be a garden variety lawsuit to avoid a constructively fraudulent transfer. Assuming the truth of the allegations, Valley View settled a dispute by paying a competitor $55 million to withdraw from bidding for an asset that later sold for $5.6 million. It is a paradigmatic constructive fraudulent transfer: whatever the cause of the disparity, it was a transfer by an insolvent debtor for which it received far less than reasonably equivalent value, no less harmful to creditors than purchasing oceanfront property in the Solomon Islands for $50 million, or any similar miscalculation or folly. The transferor's insolvency is the nub, not its financial acumen. The trustee sued Merit for its $16.5 million share and the payment of Valley View's creditors depends on its recovery. The structure of the transaction as a private sale of stock in Bedford Downs and the use of leverage appear to have been virtually incidental to its purpose, but because the parties used a bank to complete the transfer from Valley View to Merit, the stock sale is an incident that the Court is urged to hold was intended by Congress to prevent the trustee from avoiding the transfer.

B. The Statutory Text and Context Do Not Support Merit's Overexpansive Construction of Section 546(e)

The argument that § 546(e) precludes avoidance in a case such as this strikes at the heart of a trustee's mission and ability to maximize and ratably distribute the estate of a bankrupt business. It is terrible public policy but, more importantly, the argument is not supported by the text or context of the statute and is not a policy that Congress expressed an intention to promulgate. Congress acted to protect the stability of the securities-clearance system by insulating its constituents from avoidance liability. If it is also good policy to inspire investor confidence by instituting a per se rule that no sale of stock is subject to avoidance no matter how unbalanced, so long as it was not intended to defraud creditors, then Congress should pass such a law. It has not yet done so. If such a measure passes, it will surely preserve a trustee's ability to avoid for the benefit of innocent creditors transfers such as this, as well as the smorgasbord of contrived securitized transactions that will follow if § 546(e) sweeps as broadly as Merit argues it should.[3]

1. As *amicus curiae*, we will not exposit at length on what we believe are the compelling textual and contextual arguments articulated by the Seventh Circuit and the Respondent. We agree entirely with the holding that § 546(e)'s exclusion from avoidance of "a transfer made by or to (or for the benefit of)" specified intermediaries in the securities-clearance

---

[3] The type of asset sale that could be securitized in some fashion is limited only by the imagination.

system "in connection with a securities contract," refers, as a matter of plain English and in the context of Chapter 5 of the Bankruptcy Code, to the transfer that the trustee seeks to avoid, of the debtor's property to its ultimate recipient and not to its wire transfer agent. 11 U.S.C. § 546(e).

2. The word "transfer" weaves its way through Chapter 5 with apparent uniformity, from its substantive provisions for the avoidance of transfers under sections 544(a), 545, 547(b), 548 and 549, through its limitations on the avoidance of such transfers in § 546 and its provisions for (and limitations on) the recovery of avoided transfers in § 550. "[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning . . . ." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). And, in fact, the word "transfer" does have a uniform meaning within all of those provisions when it is used to refer to an avoidable transfer by a debtor to a transferee or for the benefit of a nontransferee. So used, each of the provisions in which it appears works, internally and in concert with the others, including § 546(e); it is the "fundamental transactional unit in the Code's avoiding-power provisions." Ralph Brubaker, *Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bankr. L. Letter, July 2017, at 9.

3. So used, as well, § 546(e) rests comfortably in Chapter 5 rather than presenting as a misplaced provision of the Securities Exchange Act intended to encourage the formation and investment of capital by assuring shareholders not just that their trades will

settle without disruption, but that their individual investment decisions will not be subject to scrutiny under bankruptcy laws. Courts must interpret a statute "as a symmetrical and coherent regulatory scheme," *Gustafson v Alloyd Co.*, 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 389 (1959). *Amicus* concurs that "Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place." *FTI Consulting, Inc. v. Merit Management Group, LP*, 830 F.3d 690, 694 (7th Cir. 2016).

C. The Interplay Between Sections 546(e) and 550 Demonstrates That Merit's Analytical Construct Runs Counter to Congressional Intent

Conversely, using the word "transfer" noncontextually and, in particular, to refer to whatever alienation of property a defendant chooses to identify rather than the putative avoidable transfer identified by the trustee, would make mincemeat of § 550. Moreover, as discussed below, the law that leads Merit out of its § 550 mess is exactly the law that demonstrates unequivocally why its slice-and-dice analysis is not what Congress intended when it enacted § 546(e).

1. Section 550 is integral to a trustee's exercise of the Bankruptcy Code's avoidance powers. It is the "recover" of "avoid and recover." The trustee can recover the property transferred or its value from the

"initial transferee of such transfer," § 550(a)(1), or from "any immediate or mediate transferee of such initial transferee," § 550(a)(2). To the latter, it provides a defense: a trustee may not avoid a transfer under § 550(a)(2) from a transferee that takes for value and in good faith and who did not know of the voidability of the transfer, and "any immediate or mediate good faith transferee of such transferee." 11 U.S.C. § 550(b).

Here, Merit insists for purposes of § 546(e) that there was no $16.5 million avoidable transfer from Valley View to Merit, but only three intermediate nonavoidable "transfers" to and by financial intermediaries (Pet. Br. at 2). Carrying that approach over into § 550 would mean that Merit was not the initial transferee of a $16.5 million transfer from Valley View under § 550(a)(1) or even the immediate transferee of such transferee under § 550(a)(2). Merit would be a mediate transferee thrice removed from the initial transferee. If the Code's terminology is to be applied uniformly, then under Merit's construct, even if § 546(e) did not apply, the money could not be recovered from Merit if any one of its predecessor transferees was a good-faith transferee. Obviously, if transfers can be diced thusly, it would be a rare avoidable transfer that could be recovered under § 550.

2. There is a meaningful nexus between the foregoing dilemma and Merit's flawed interpretation of § 546(e). The background law that prevents this result is the very law that gave rise to § 546(e). As discussed by the Respondent (Res. Br. at 37), the law in all circuits is settled that a transferee is an entity with "dominion over the money" or "the right to put the money to one's own purposes" and not an intermediary

or conduit. *See, e.g., Bonded Fin. Serv., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988). This principle is the genesis of § 546(e), which was enacted in 1976 in response to a district court's failure to rule on summary judgment that a clearing association received payments from a bankrupt commodity broker as a "conduit" and not as a "transferee." *Seligson v.New York Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975). The *Seligson* court found that the trustee had "raised a genuine issue as to whether [the debtor] owed its obligation directly to the credit members, and this issue is material to the question of whether the Association acted as an agent for net credit members." *Id.* at 136. Congress abrogated the decision by providing that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, 92 Stat. 2549 (1978), *codified at* 11 U.S.C. § 746(c) (repealed 1982); *see* S. Rep. No. 95-989, at 105 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5891.

3. But Merit puts § 546(e) to a very different use than Congress intended. The statute provided "belt and suspenders" protection to the clearinghouse. Inasmuch as Merit treats § 546 and § 550 as if they bore no relation to each other (in order to avoid the absurd result discussed above), it would be the first to admit that § 546(e) was not intended to displace the principle that transfers to intermediaries are not avoidable. Nor is there evidence that Congress intended to preclude the *Seligson* trustee from suing those for whom the trustee claimed the clearinghouse was acting as agent, in order to avoid the same debtor-

to-ultimate-recipient transfer that is at issue in this case.

Thus, Merit inverts the intended operation of § 546(e). If the law does not recognize any transfer from Valley View to Merit, as Merit contends, then, necessarily, each of the intermediate transactions constitutes a transfer that is subject to avoidance, or would be but for the protection of § 546(e). But Congress intended § 546(e) to supplement, not replace, the law on transfers to conduits or intermediaries. Merit's convenient interpretation of § 546(e) is inconsistent with that intent.

II. This Case Should Not Be Decided on the Basis of its Implications for Failed Leveraged Buyouts of Large Public Corporations

Amicus wishes also to address the view of the Tribune *amici* that the Court should decide this matter with both eyes focused on its implications for fraudulent transfer cases involving failed leveraged buyouts of large public corporations, such as the recent Tribune and Lyondell bankruptcy cases. A trustee's ability to avoid failed leveraged buyouts as constructively fraudulent to creditors, in appropriate circumstances, is tremendously important as a matter of bankruptcy policy. The § 546(e) exception achieves its intended purpose of ensuring the stability of the securities-clearance system. While individual shareholder recipients of LBO largesse may have concerns that a trustee may pursue their gains from the sale of stock at a premium so steep that it does not constitute fair consideration (however unlikely that may be), there is no evidence other than their own expansive interpretation of the text of § 546(e) that

Congress intended them to be its beneficiaries. Certainly, the application of § 546(e) is unwarranted in the context of the private transactions in which the issue nearly always arises.

A. Leveraged Buyouts Have Exactly the Type of Pernicious Effect on Unsecured Creditors That the Bankruptcy Code Was Intended to Address

1. Many of the most important purposes of our bankruptcy laws converge when a company descends into bankruptcy following a leveraged buyout. Without fail, the principal victims are unsecured creditors, which may include not just trade creditors but bondholders such as employee pension plans, retirement plans, mutual funds, and other entities that manage funds belonging to millions of individuals. The immediate beneficiaries are the shareholders, that is to say, former controlling shareholders who commanded a large premium made possible by borrowings against corporate assets, creating a debt load the company could not carry. To be sure, unsecured creditors are not the only stakeholders to lose. But they are among the only who did not make a calculated gamble on a new capital structure. They had no say when the target company's operating needs were balanced against the buyer's desire to maximize its investment return through leverage.

In such cases, the trustee's avoidance power vindicates not only the policies of maximizing the estate and equality of treatment among creditors, but also the traditional priority of creditors over shareholders, commonly expressed as the absolute

priority rule.[4] "The Code's priority system constitutes a basic underpinning of business bankruptcy law." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2016); *see also Northern Pac. R. Co. v. Boyd*, 228 U.S. 482, 504 (1913) ("Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid."). Though it occurs prior to bankruptcy, a transaction in which a company effectively cashes out its controlling shareholders at the expense of its solvency is for all practical purposes a device that prefers stockholders over creditors, analogous to the insider machinations the absolute priority rule is intended to counter. *See Bank of America Nat. Trust & Sav. Assn. v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 444 (1999) (discussing how the absolute priority rule was developed in response to "concern with 'the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage'" (quoting Report of the Comm'n on the Bankruptcy Laws of the United States, H. R. Doc. No. 93–137, pt. I, at 255 (1973))).

2. Most leveraged buyouts are private transactions. Steven N. Kaplan & Per Stromberg, *Leveraged Buyouts and Private Equity*, 23 J. Econ. Perspectives 121, 127-28 (2009) (Between 1995 and 2004, leveraged buyouts of private companies accounted for over 90% of transactions and 80% of transaction value, declining as a percentage of transaction value to 66% during the

---

[4] *See* 11 U.S.C. § 1129(b)(2) (requiring for confirmation of a plan of reorganization, absent consent, that creditors and equity interest holders be paid in order of priority).

following 3 years). What gives this public policy issue such significance is their exponential growth, the risks they pose to unsecured creditors, and the lack of other effective remedies when they fail other than the trustee's avoidance powers. While there were only 103 leveraged buyouts from 1970 through 1984, from 2005 through 2007 alone there were 5,188 leveraged buyouts representing a combined estimated enterprise value of over $1.5 trillion. *Id.* at 126-27. While we have been unable to obtain updated statistics for what, from an avoidance perspective, would represent the current "generation" of leveraged buyouts, interest rates remain low, and "[w]hen credit is cheap and the economy is growing, highly leveraged buyouts represent the optimal means by which private equity firms acquire target companies." Samir D. Parikh, *Saving Fraudulent Transfer Law*, 86 Am. Bankr. L.J. 305, 307 (2012).

3. By nature, these transactions expose unsecured creditors to risk. The form varies greatly but the net effect is the same: A company with a healthy balance sheet and liquidity incurs substantial debt and grants liens on its assets to finance the purchase of itself. The acquisition is financed with 60-90% debt. Kaplan at 124. The target company will necessarily have significant equity that can be replaced by the financing debt and ample cash flow available for the increased debt service. *See* Peter A. Hunt, *Structuring Mergers & Acquisitions 101*, 293 (4th ed. 2009). As a result, the company's debt ratio increases *on average* from 38% to

70%.[5] The replacement debt is lower-grade, *see* Hunt at 300-03, and the buyer's investment horizon is often fairly short: 42% exit within five years of the buyout. Kaplan at 127. The magic of leverage reduces capital risk to the buyer and greatly increases its potential return on investment, while generating tax savings from the deduction of interest. The promise of a substantial return generates a large premium for selling shareholders; private equity typically pays public shareholders a 15-50% premium over the current stock price. Kaplan at 124. Unsecured creditors gain no benefit from the increased risk of insolvency, however, and once in bankruptcy, the company's assets are usually fully encumbered by the liens securing the debt that financed the acquisition. *See generally* John H. Ginsberg et al., *Befuddlement Betwixt Two Fulcrums: Calibrating the Scales of Justice to Ascertain Fraudulent Transfers in Leveraged Buyouts*, 19 Am. Bankr. Inst. L. Rev. 71, 74-75 (2011).

The Third Circuit captured the problem twenty-five years ago: "The problem universal to all LBOs—characterized by their high debt relative to equity interest—is that they are less able to weather temporary financial storms because debt demands are less flexible than equity interest." *Mellon Bank, N.A. v. Metro Commc'ns*, 945 F.2d 635, 647 (3d Cir. 1991).

---

[5] *See* Ulf Axelson, Tim Jenkinson, Per Stromberg & Michael Weisbach, Borrow Cheap, Buy High? The Determinants of Leverage and Pricing in Buyouts 32 (Nat'l Bureau of Econ. Research, Working Paper No. 15952, 2010), available at http://www.nber.org/papers/w15952, at 47 tbl. 5 (finding, in broad sample of LBOs, ratio of debt to enterprise value increased from average of 0.38 pre-LBO to average of 0.70 post-LBO).

One need look no further than Tribune Company for a recent example. After the company incurred nearly $9 billion in new debt to finance its own acquisition, it was left in the position that it would be insolvent if its financial projections were off by even two percent. *See* Report of Kenneth N. Klee, As Examiner, *In re Tribune Co.*, No. 08-13141, Vol. 1 at 170-78, 205-10, 460-62 (Bankr. D. Del. Aug. 3, 2010) [hereinafter "Klee Report"]; Complaint at 26, *Official Comm. v. Fitzsimons (In re Tribune Co.)*, No. 10-54010 (Bankr. D. Del. Nov. 1, 2010). When a financial analytics firm balked at issuing a solvency opinion, it was replaced by one that would. The company fell into bankruptcy in less than a year. *See generally* Ginsberg at 73.

4. Because the transaction is structured around secured debt, the trustee's avoidance powers usually represent unsecured creditors' best or only hope for a meaningful recovery. As the Tribune examiner explained, because the LBO financing "occupies a structurally senior position, if this indebtedness is not avoided, subordinated, or disallowed, the holders of those claims would recover most of the value available from the Debtors' bankruptcy estates. . . . Thus, among the above-listed potential avoidances and recoveries underlying Question One, the actions to avoid the LBO Lender Debt are the proverbial "main event."" Klee Report, Vol. 2 at 10.

B. There is No Evidence That Congress Intended Section 546(e) to Advance the Behavioral Economics Policies Postulated by *Amici*

Congress enacted § 546(e) "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market," H.R. Rep. No. 97-420, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583. The merits of the behavioral economics principles expounded by *Amici*—promoting capital formation and liquidity by instilling investor confidence that their investment decisions can never be challenged—are debatable as a matter of economic and bankruptcy policy. Regardless, the timeline and legislative history of § 546(e) do not support the conclusion that Congress had any goal more ambitious than maintaining the stability of the securities clearance and settlement system. Indeed, the evidence is so sparse that the degree of certainty expressed by some is puzzling. Most such litigation involves private transactions but if greater investor protections are needed, Congress will act. Section 546(e) was not such an act.

1. The only kind of avoidance litigation that could implicate the broad policies discussed by the Tribune *amici* would be avoidance litigation concerning the failed leveraged buyout of a large public company. Between 1970 and 1984, however, leveraged buyouts were rare: only 103 were announced from 1970 through 1984. Kaplan at 127 tbl.1. At the time of the 1981 Subcommittee Hearings, leveraged buyouts remained an anomaly, and there is no mention of leveraged buyouts or the potential fraudulent transfer

implications of stock transfers in the 500 pages of testimony during the 1981 Subcommittee Hearings. Parikh at 337-38.

2. The purpose of the 1982 amendment was simply to add the same protections for the securities markets as the commodities markets. As stated in the House Report:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature the markets [*sic*], *certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.*
>
> The Bankruptcy Code now expressly provides certain protections to the commodities market *to protect against such a "ripple effect."* One of the market protections presently contained in the Bankruptcy Code, for example, prevents a trustee in bankruptcy from avoiding or setting aside, as a preferential transfer, margin payments made to a commodity broker (see *11 U.S.C. Sec. 764(c)*).
>
> The thrust of several of the amendments contained in H.R. 4935 is to clarify and, in some instances, broaden the commodities market protections and *expressly extend similar protections to the securities market.*

H.R. Rep. No. 97-420 at 1-2 (emphasis added).

By 2005, of course, a substantial body of law had developed concerning the application of § 546(e) in actions to avoid leveraged buyouts—on both sides of the issues—yet the House Report accompanying the 2005 amendment (which added "financial participants" to the list of protected entities) reflected no change in legislative intent, reiterating that § 546(e) was "designed to reduce systemic risk in the financial market place." H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89. Had Congress intended to expand the application of § 546(e) beyond its original purpose, or even to clarify its application in the face of frequent judicial resistance to the Tribune *amici's* position, it would presumably have said so. As this Court famously said, "Congress ... does not ... hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

3. Section 546(e) was enacted to counteract a particular kind of risk. It achieves that purpose. In the clearance-and-settlement system, parties "use intermediaries to make trades of [securities] which are instantaneously credited, but in which the actual exchange of [securities] and consideration therefor takes place at a later date." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998). In this system, the intermediaries' role is "critical" because of the lapse of time in between the date of a trade (when the intermediary credits and debits the counterparties' accounts) and the date of settlement (when the securities and consideration are actually exchanged). *Id.* at 676. The system "depends upon a series of guarantees, made by all parties in the chain," including the intermediary, "that they will live up to their obligations regardless of a default by another party in

the chain." *Id.* If the "pre-bankruptcy trades by a bankrupt intermediary could be set aside" through avoidance, then "the guarantees that allow the system to function would be threatened," and "a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry." *Id.*

As Judge Gerber recognized in *Lyondell*, actions directed at "LBO payments [made] to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves" "would not create systemic risk." *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014).

4. There is simply no evidence other than Merit's and *amici's* own expansive reading of the text that congressional intent in enacting and amending § 546(e) was to promote capital formation and prevent avoidance actions from eroding investor confidence and discouraging public investment (Tribune Am. Br. at 27) or to prevent trustees from "unwinding long-settled, complicated transactions and creating arbitrary distinctions among market participants." *Id.* at 30. Courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 13-14 (2000). Congress circumscribed the avoidance powers of bankruptcy trustees so that a bankruptcy would not generate litigation against market intermediaries. Congress did not foreclose avoidance action against every market participant, or

abandon the Code's fundamental goal of maximizing creditor recoveries.

CONCLUSION

Amicus submits that the decision of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Bradford J. Sandler
Counsel of Record
Dean A. Ziehl
Harry D. Hochman
PACHULSKI STANG ZIEHL & JONES
10100 Santa Monica Boulevard, Suite 1300
Los Angeles, California 90067
Telephone: (310) 277-6910
bsandler@pszjlaw.com

Counsel for Amicus Curiae

ECORD
AND
RIEFS

No. 16-784

Supreme Court, U.S.
FILED
JUL 18 2017
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF OPPORTUNITY PARTNERS, L.P. IN SUPPORT OF PETITIONER

ALAN E. GOLOMB
Counsel for Amicus Curiae
492 Bardini Drive
Melville, New York 11747
(516) 509-0509
aandp492@aol.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

RELEVANT BACKGROUND 2

ARGUMENT 4

I. Every Plaintiff in Federal Court Must Establish Constitutional (Article III) Standing 4

A. Every Federal Court has a Duty to Determine Whether a Plaintiff has Standing 4

B. Neither the District Court nor the Circuit Court Determined that FTI had Constitutional Standing 4

II. The Litigation Trust lacks Constitutional Standing 5

A. To Establish Constitutional Standing, a Plaintiff Must Establish Three Elements: (1) Injury in Fact, (2) Causation, and (3) Redressability 5

B. FTI has not Established That the Litigation Trust Suffered a Legally Cognizable Injury in Fact Caused by Merit 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation (Sept. 9, 2016) (No. 16-317) 1

Elliott v. Glushon, 390 F.2d 514 (9th Cir. 1967) 7

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 4

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 5, 7

In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016) 1

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 6, 7

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 7

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 6

United States v. Hays, 515 U.S. 737 (1995) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III 2, 5, 8, 9

STATUTES

11 U.S.C. § 548(a)(1) 8

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Jack F. Williams, Revisiting the Proper Limits of Fraudulent Transfer Law, 8 Bankr. Dev. J. 55 (1991) 6

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, Opportunity Partners L.P., submits this brief in support of petitioner and defendant Merit Management Group, LP ("Merit"). *Amicus* is one of thousands of defendants in *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), *petition for cert.* (filed as *Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation* (Sept. 9, 2016) (No. 16-317)). Like the present case, the plaintiff in the *Tribune* case seeks to avoid pre-petition payments made to passive equity holders of a company in connection with an arm's-length purchase of that company. There is no allegation in either case that a defendant engaged in misconduct. *Amicus* has been unable to find any case in which a court determined that establishing the causation element of constitutional standing does not require an allegation of misconduct. Since none of the briefs by the parties has addressed this threshold issue, this brief attempts to fill that void.

---

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

If (1) a company is purchased for a price reached through arm's-length negotiations, and (2) the transaction is not intended to hinder, delay, or defraud any creditor of the purchaser, an equity investor in the acquired company, by receiving its *pro rata* share of the purchase price, has not caused an injury in fact to the purchaser. This conclusion does not change if the purchaser files a petition for bankruptcy within two years after such purchase even if (1) the purchaser was insolvent at the time of the transaction, or (2) the purchase rendered the purchaser insolvent. Hence, the purchaser's estate lacks Article III standing to avoid such payments.

RELEVANT BACKGROUND

Respondent and plaintiff FTI Consulting Inc. ("FTI") is the trustee of the Centaur, LLC Litigation Trust (the "Litigation Trust"), which is entitled to pursue claims on behalf of Valley View Downs, LP ("VVD"), a Chapter 11 debtor (the "Debtor"). Before VVD filed for bankruptcy, it and Bedford Downs Management Corporation ("Bedford") were competitors for Pennsylvania's last available harness license. VVD's intention was to obtain harness and gaming licenses and to develop a "racino," i.e., a race track with a casino in Lawrence County, Pennsylvania. Toward that end, VVD

and Bedford entered into an agreement (the "Settlement Agreement") whereby VVD would acquire Bedford for $55 million if Bedford withdrew its application and VVD obtained the harness racing license.

The Commission awarded VVD the harness license and, on October 30, 2007, VVD transferred $55 million to Bedford, including $16,503,850 representing Merit's equity interest in Bedford. On July 10, 2008, the Gaming Board denied VVD's request for a conditional gaming license. On October 28, 2009, VVD filed a voluntary Chapter 11 petition with the Bankruptcy Court and on July 28, 2011, the Bankruptcy Court entered an order establishing the Litigation Trust.

On October 27, 2011, FTI filed a complaint in which it sought to avoid the $16,503,850 received by Merit as an alleged fraudulent conveyance. FTI's complaint did not allege that Merit did anything wrong, that the Settlement Agreement was intended to hinder, delay, or defraud any creditor, or that it was not negotiated in good faith and at arm's-length.

ARGUMENT

I. Every Plaintiff in Federal Court Must Establish Constitutional (Article III) Standing.

A. Every Federal Court has a Duty to Determine Whether a Plaintiff has Standing.

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)) (internal quotation marks omitted). This "special obligation [of every federal court] to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' [is not waived] even though the parties are prepared to concede it." *FW/PBS*, *supra*, at 231 (internal citations omitted).

B. Neither the District Court nor the Circuit Court Determined that FTI had Constitutional Standing.

Merit submitted a motion to dismiss in which it asserted, among other things, that FTI failed to establish constitutional standing:[2]

---

[2] In its motion to dismiss, Merit also contested FTI's statutory standing. The District Court ruled against Merit on that point and Merit did not appeal it. *Amicus curiae* takes no position as to whether FTI has statutory standing.

> To establish constitutional standing, a plaintiff must show that "(1) it personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision in the suit." *Nat'l Council on Compensation Ins., Inc.*, 2009 WL 2588902 at *2; *see also Perry*, 222 F.3d at 313. FTI as Plaintiff cannot establish even the first element – neither FTI as Plaintiff nor the Litigation Trust suffered any injury as a result of any conduct by Merit. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

FTI did not dispute Merit's contention. Despite the District Court's "special obligation" to determine that FTI had constitutional standing to sue Merit, it did not expressly make such a finding. On appeal, Merit did not raise the issue of constitutional standing and the Circuit Court, like the District Court, did not address it.

II. The Litigation Trust lacks Constitutional Standing.

A. To Establish Constitutional Standing, a Plaintiff Must Establish Three Elements: (1) Injury in Fact, (2) Causation, and (3) Redressability.

In its motion to dismiss, Merit correctly stated the three requirements necessary to establish a plaintiff's Article III standing: (1) injury in fact, i.e., an invasion

of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, i.e., that the injury can fairly be traced to the challenged action of the defendant and did not result from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, i.e., that the prospect of obtaining relief from the injury as a result of a favorable ruling is not speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

"[A] plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. FTI has not Established That the Litigation Trust Suffered a Legally Cognizable Injury in Fact Caused by Merit.

As noted, an injury in fact is "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. It has been posited that even an innocent fraudulent transfer "infringes" on a creditor's right to maximize its recovery on a claim against a bankrupt debtor's estate. *Jack F. Williams, Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 Bankr. Dev. J. 55 (1991). However, FTI did not allege that Merit did anything other than receive payment for its equity interest in Bedford, which

is certainly not illegal or improper. Moreover, FTI did not allege that the Settlement Agreement was intended to hinder, delay, or defraud any creditor of VVD or that it was not the result of arm's-length negotiation.

To be legally cognizable, an injury in fact must be one that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976) ("Although the law of standing has been greatly changed in (recent) years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.").

A passive shareholder of a corporation, by receiving payment for its shares pursuant to an arm's-length transaction, does nothing wrong. *Elliott v. Glushon*, 390 F.2d 514 (9th Cir. 1967) ("The actions legislated against are not 'prohibited'; those persons whose actions are rendered 'null and void' are not made 'liable'; and terms such as 'damages' are not used. The legislative theory is cancellation, not the creation of liability

for the consequences of a wrongful act."). Indeed, with respect to the Settlement Agreement, FTI did not allege that Merit engaged in concealment, collusion, willful blindness, negligence or any other wrongdoing.

The Litigation Trust (and VVD's creditors) may have buyer's remorse due to VVD's failure to achieve its goal of developing a racino. However, buyer's remorse is not a cognizable injury and, even if it was, FTI does not allege that Merit caused it. Here, the undisputed facts suggest that VVD became insolvent because its application for a gambling license was denied.[3] However, that denial was not caused by anything Merit did. Whether VVD was insolvent prior to or after Merit received payment for its investment in Bedford does not change the fact that no injury to the Litigation Trust is fairly traceable to Merit's actions.

CONCLUSION

Section 548(a)(1) of the Bankruptcy Code authorizes the trustee of an insolvent debtor's estate to avoid certain transfers made within two years prior to the date of filing a petition for bankruptcy. That does not mean that the estate automatically satisfies Article III's standing requirements. *Spokeo*, 136 S. Ct. at 1549.

[3] Since VVD's petition for bankruptcy was filed (1) two years after it acquired Bedford and, (2) more than fifteen months after its gaming license was denied, one can infer that the FTI's claim is nothing more than "fraud by hindsight."

To establish Article III standing, the trustee must credibly allege (and ultimately prove) that the bankrupt's estate was injured because the defendant (1) did something it should not have done, or (2) did not do something it should have done.[4] Here, however, FTI did not allege that Merit did anything wrong. Neither buyer's remorse nor a fallacious claim of fraud by hindsight satisfies the causation element of constitutional standing. Therefore, FTI has failed to meet its burden. Consequently, the courts below lacked subject matter jurisdiction and this Court should vacate their orders and direct dismissal of this lawsuit with prejudice.

Dated: July 18, 2017

Respectfully submitted,

ALAN E. GOLOMB
Counsel for Amicus Curiae
492 Bardini Drive
Melville, New York 11747
(516) 509-0509
aandp492@aol.com

[4] More generally, it is axiomatic that an injury cannot be fairly traceable to a defendant if the injury was not reasonably foreseeable, i.e., if there is nothing a reasonable similarly situated defendant could have done to prevent the injury.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 18 2017
OFFICE OF THE CLERK

No. 16-784

IN THE

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF TRIBUNE COMPANY RETIREES AND NOTEHOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAY TEITELBAUM
TEITELBAUM LAW GROUP, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. BY ITS TERMS, SECTION 546(e) DOES NOT APPLY WHERE A COVERED ENTITY SERVED ONLY AS A CONDUIT 5

A. Section 546(e) Applies Only Where The Debtor Or The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity 5

B. Petitioner Misinterprets Section 546(e) And Would Vastly Expand The Exception's Narrow Exclusion From The Trustee's Avoidance Powers 10

II. THE LEGISLATIVE HISTORY CONFIRMS THAT SECTION 546(e) DOES NOT PROTECT TRANSFERS CONDUCTED THROUGH FINANCIAL INSTITUTIONS 18

A. Congress Enacted The Exception To Protect Against The Risk That The Bankruptcy Of One Commodities Or Securities Firm Could Spread To Other Firms 19

TABLE OF CONTENTS—Continued

Page

B. The Problem Section 546(e) Addresses Is Not Implicated Where Neither The Debtor Nor The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity 24

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of Am. Nat'l Tr. & Sav. Ass'n v. *203 N. LaSalle St. P'ship*,
526 U.S. 434 (1999) 18, 27

Begier v. *IRS*,
496 U.S. 53 (1990) 6

Bevill, Bresler & Schulman Asset Mgmt. Corp. v. *Spencer Sav. & Loan Ass'n*,
878 F.2d 742 (3d Cir. 1989) 22

BFP v. *Resolution Tr. Corp.*,
511 U.S. 531 (1994) 6

Bonded Fin. Servs., Inc. v. *European Am. Bank*,
838 F.2d 890 (7th Cir. 1988) 10

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 17

Hall v. *United States*,
132 S. Ct. 1882 (2012) 5, 13, 17

Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*,
530 U.S. 1 (2000) 18

Law v. *Siegel*,
134 S. Ct. 1188 (2014) 29

In re Lyondell Chem. Co.,
503 B.R. 348 (Bankr. S.D.N.Y. 2014) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Coutee,
984 F.2d 138 (5th Cir. 1993) 10

New York State Dept. of Social Servs. v. *Dublino*,
413 U.S. 405 (1973).....18

Picard v. *Fairfield Greenwich Ltd.*,
762 F.3d 199 (2d Cir. 2014) 6

RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*,
132 S. Ct. 2065 (2012).....5, 29

Robinson v. *Shell Oil Co.*,
519 U.S. 337 (1997).....17

Seligson v. *N.Y. Produce Exch.*,
394 F. Supp. 125 (S.D.N.Y. 1975) 19, 20, 32

In re Tribune Co. Fraudulent Conveyance Litig.,
818 F.3d 98 (2d Cir. 2016).....2

Utility Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014).....17

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001).....18

Wieboldt Stores, Inc. v. *Schottenstein*,
131 B.R. 655 (N.D. Ill. 1991) 22, 26

Zahn v. *Yucaipa Capital Fund*,
218 B.R. 656 (D.R.I. 1998).....25, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

11 U.S.C. § 101(54) 7
11 U.S.C. § 544 ..... 6, 7, 17
11 U.S.C. § 545 ..... 6, 7, 17
11 U.S.C. § 546(d) 22
11 U.S.C. § 546(e) ..... *passim*
11 U.S.C. § 546(f) 23
11 U.S.C. § 546(g) 23
11 U.S.C. § 546(i) 23
11 U.S.C. § 547 ..... 6, 7, 17
11 U.S.C. § 547(a)(4)(B) 14
11 U.S.C. § 547(b) 7, 17, 24
11 U.S.C. § 547(b)(4)(B) 13
11 U.S.C. § 548 ..... 6, 7
11 U.S.C. § 548(a) 24
11 U.S.C. § 548(a)(1)(A) 6, 7
11 U.S.C. § 548(a)(1)(B) 6, 17
11 U.S.C. § 548(b) 17
11 U.S.C. § 550(a) 8, 9
11 U.S.C. § 550(b) 14

TABLE OF AUTHORITIES—Continued

Page(s)

11 U.S.C. § 764(c) 20, 21, 22

Pub. L. No. 95-598, 92 Stat. 2549 (1978).....20

Pub. L. No. 97-222, 96 Stat. 235 (1982).....22

Pub. L. No. 98-353, 98 Stat. 333 (1984).....22

Pub. L. No. 109-8, 119 Stat. 23 (2005).....23, 24

Pub. L. No. 109-390, 120 Stat. 2692 (2006).....23

13 Eliz. (1570).....6

Legislative History

H.R. 31 and H.R. 32, Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 19, 20

H.R. Rep. No. 95-595 (1977) 20

H.R. Rep. No. 96-1195 (1980) 21

H.R. Rep. No. 97-420 (1982) 21, 22

H.R. Rep. No. 109-31(I) (2005).....23

H.R. Rep. No. 109-648 (2006).....24, 30

S. Rep. No. 95-989 (1978).....21

S. Rep. No. 98-65 (1983).....23

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

5-546 Collier on Bankruptcy ¶ 546.LH[5] (16th ed. 2017) 21

Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 No. 7 Bankr. L. Letter NL 1, July 2017.....11, 24

Irving E. Walker & G. David Dean, *Structuring a Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16 (2009).....27

BRIEF OF TRIBUNE COMPANY RETIREES AND NOTEHOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amici are former unsecured creditors of Tribune Company, which filed a bankruptcy petition less than a year after a disastrous leveraged buyout siphoned more than $8.2 billion from the company to its shareholders in exchange for their Tribune shares. *Amici* include both retired Tribune employees who hold claims for unpaid retirement benefits, as well as noteholders of Tribune's pre-LBO notes and subordinated debentures, each of whom received a fraction (or in some cases none) of what they were owed when Tribune exited bankruptcy in 2012. *Amici* brought state-law constructive fraudulent transfer claims against Tribune's former shareholders seeking to avoid payouts made as part of the LBO. Those claims are the subject of a petition for certiorari that is pending before this Court. See *Deutsche Bank Trust Company Americas* v. *Robert R. McCormick Foundation*, No. 16-317 (Sept. 9, 2016).[2]

---

[1] The parties have given blanket consent to the filing of *amicus curiae* briefs in support of either party. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

[2] The noteholder *amici* are Deutsche Bank Trust Company Americas, Delaware Trust Company, and Wilmington Trust

In *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), the Second Circuit held that 11 U.S.C. § 546(e)—the provision at issue in this case—barred *amici*'s constructive fraudulent conveyance claims. Specifically, the Second Circuit held that Section 546(e) protects from avoidance by a bankruptcy trustee any fraudulent transfer that involves a financial institution; that the presumption against federal preemption of state law does not apply in the bankruptcy context; and that Section 546(e) sweeps more broadly than its text to preempt fraudulent-transfer actions brought by private parties (as opposed to just the "trustee" expressly mentioned in the provision).

Amici's petition for certiorari challenged each of those holdings, and this case addresses one of the questions raised in that petition: whether Section 546(e), which protects from avoidance by the trustee certain transfers "made by or to (or for the benefit of)" financial institutions and other covered entities, applies where the financial institution served only as a conduit for a transfer between the debtor and the ultimate transferee (neither of which is a covered entity). The outcome of this case could therefore materially affect *amici*.

Company. The 186 retiree *amici* are listed in the appendix to the petition for certiorari in No. 16-317.

SUMMARY OF ARGUMENT

I. Section 546(e) is an exception to provisions of the Code designed to allow avoidance of fraudulent conveyances. It provides that the trustee cannot, using a theory of constructive fraudulent conveyance, avoid a "transfer" that is a settlement payment "made by or to (or for the benefit of)" a financial institution or other covered entity. "Transfer" is an express reference to the transfers otherwise avoidable by the trustee under the Code. The relevant transfer, for purposes of Section 546(e), is therefore the *transfer that the trustee seeks to avoid*. Thus, if either the debtor or the entity from which trustee seeks to recover (*i.e.*, the ultimate transferee) is a financial institution, then the exception applies. If, however, neither the debtor nor the entity targeted by the trustee's avoidance action is a financial institution, then the exception does not apply—irrespective of whether the transfer happened to pass *through* a financial institution en route to the transferee.

Petitioner, however, would read Section 546(e) to protect transfers in which a financial institution is simply "involved," even as a mere conduit. But as the Seventh Circuit explained, nearly every non-cash financial transaction *involves* a financial institution or other covered entity in some capacity—a fact that Petitioner does not dispute. Under Petitioner's theory, then, a trustee could not avoid any fraudulent transfer (other than those made with fraudulent intent) involving stocks, bonds, commodities, electronic bank transfers, or even paper checks—a sweeping interpretation of the exception's scope. Section 546(e), however, is a

narrow *exception* to the avoidance powers expressly conferred on the trustee by multiple provisions of the Bankruptcy Code. Petitioner's rule would eviscerate the trustee's avoidance powers with respect to a wide swath of fraudulent transfers.

II. Section 546(e)'s legislative history confirms that the exception applies only where the debtor or the transferee targeted by the trustee is a covered entity. When Congress included the initial version of the exception in the Bankruptcy Code of 1978, it sought to address a specific concern: the risk that the insolvency of one party in the commodities clearance system could spread to other firms, leading to the collapse of the entire market. Congress therefore added the exception to prevent the trustee from avoiding transfers by or to commodity brokers and clearing organizations. In a series of amendments, Congress broadened the types of institutions covered by the exception—adding securities firms, stockbrokers, and the like. But the purpose of the exception remained the same: to protect against the systemic risk to the markets that could result from undoing transfers by or to covered entities.

Those concerns are implicated where a trustee brings an avoidance action *against* a clearing house or other covered entity. But those concerns are not implicated where, as in this case, a transfer between two non-covered entities simply *involves* a financial institution that is neither the debtor nor the ultimate transferee. Petitioner protests that the Seventh Circuit's decision does not protect individual investors from avoidance actions. But Congress enacted section 546(e) to prevent systemic risk to the

market—not to protect investors who have benefited from fraudulent transfers. Petitioner would re-write the narrow exception enacted by Congress—and stretch the exception beyond the breaking point.

ARGUMENT

I. BY ITS TERMS, SECTION 546(e) DOES NOT APPLY WHERE A COVERED ENTITY SERVED ONLY AS A CONDUIT

"The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is [this Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). Particularly in light of the Code's "complex terrain of interconnected provisions and exceptions enacted over nearly three decades," it is "not for [courts] to rewrite the statute"; rather, courts must interpret the Code according to its "plain language, context, and structure." *Hall* v. *United States*, 132 S. Ct. 1882, 1893 (2012). Here, Section 546(e)'s plain language, context, and structure all make clear that the exception does not apply to transfers in which a financial institution or other covered entity served only as a conduit. Rather, the exception applies only where the debtor or ultimate transferee is a covered entity.

A. Section 546(e) Applies Only Where The Debtor Or The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity

Fraudulent transfers are a widely recognized evil. The Bankruptcy Code and other laws allow them to

be avoided because they take money rightfully belonging to creditors and give it to someone else. "A fraudulent conveyance (or fraudulent transfer) action seeks to recover or avoid transfers that wrongfully reduce the pool of assets available to creditors." *Picard* v. *Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (2d Cir. 2014). "The modern law of fraudulent transfers had its origin in the" 1570 Statute of Elizabeth, "which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.'" *BFP* v. *Resolution Tr. Corp.*, 511 U.S. 531, 540 (1994) (quoting 13 Eliz., ch. 5 (1570)). All 50 states have fraudulent transfer statutes, and "[e]very American bankruptcy law has incorporated a fraudulent transfer provision." *Id.* at 541.

Under the Bankruptcy Code, as under state fraudulent-transfer laws, a transfer may qualify as "fraudulent" either because it was made with "actual intent to hinder, delay, or defraud" a creditor, or because it was made in exchange for less than "reasonably equivalent value" while the transferor was insolvent or otherwise financially distressed (and thus a "constructive" fraud). 11 U.S.C. § 548(a)(1)(A), (B). The Code grants the trustee in bankruptcy expansive powers to unwind such fraudulent transfers. See 11 U.S.C. §§ 544, 545, and 548. It also grants the trustee the power to avoid preferential payments to creditors made in a specified period preceding the petition date. See 11 U.S.C. § 547. When a trustee "avoids" a transfer under those provisions, it returns to the bankruptcy estate "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). The trustee's

avoidance powers are therefore among the most powerful tools in the trustee's arsenal—and promote the Code's goal of maximizing creditor recoveries.

Section 546(e) carves out a narrow exception to the trustee's avoidance powers under the Code. Specifically, it provides that, "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title," a trustee using a theory of constructive fraudulent conveyance cannot avoid "a transfer" that is a settlement payment "made by or to (or for the benefit of)" a financial institution or other covered entity (where there was no fraudulent intent).[3] Although Section 101(54) defines transfer to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" property or an interest in property, the only transfers that are implicated by Section 546(e) are those that are otherwise avoidable by the trustee under Sections 544, 545, 547, and 548.

A "transfer," of course, requires a transferor (typically the debtor) and a transferee. For example, Section 547(b) provides that the trustee may, in certain circumstances, avoid a "transfer of an interest of the debtor in property" made "to or for the benefit of a creditor." What Section 546(e)'s exception says, then, is that, notwithstanding Section 547(b), the trustee cannot avoid a transfer in which either the debtor (transferor) or creditor (transferee) is a financial institution (or in which a

---

[3] The exception does not apply to transfers made with the intent to defraud. See 11 U.S.C. § 546(e) (excluding from the exception transfers avoidable under Section 548(a)(1)(A)).

transfer between non-financial institutions is made for the benefit of a financial institution).

But Section 546(e) does not protect transfers that simply pass *from* a debtor, *through* a financial institution, and *to* a creditor (the ultimate transferee). That is because the Code defines a "transfer," within the meaning of the exception, as a transfer that would otherwise be *avoidable by the trustee* under the avoidance provisions enumerated in Section 546(e). As the Seventh Circuit explained (at Pet. App. 12-13), the trustee can avoid a transfer only to a "transferee," 11 U.S.C. § 550(a), and a party does not qualify as a transferee unless it has gained a beneficial interest in that property—an interest that a financial intermediary does not obtain. In other words, an avoidable "transfer" can occur only between two entities with an ownership interest in the property—the debtor, and the ultimate transferee.

Another way to approach the question—and to define the relevant "transfer" for purposes of Section 546(e)—is to ask: *What is the transfer that the trustee seeks to avoid?* Consider, for example, the transfer of stock from Company A to Company B, neither of which is a covered entity. That transfer will, by necessity, pass *through* a financial institution that exchanges the stock for consideration. But, if the trustee brings a claim against Company B (the transferee/creditor) to recoup property on behalf of Company A (the transferor/debtor), the relevant "transfer"—*i.e.*, the transfer that "the trustee may not avoid," 11 U.S.C. § 546(e)—is the transfer *by* Company A *to* Company B, the parties at the ends of the asset-transfer chain. Neither is a financial

institution, so by its text Section 546(e)'s exception does not apply (even though the transfer happened to go through a financial institution).

Now imagine that Company A exchanges the same stock with Company C, a bank. If the trustee seeks to avoid that transfer, it would do so by bringing an action against *the bank*—the transferee to which the relevant "transfer" was ultimately made, and from which the trustee seeks to recover. And in that scenario, the exception *will* kick in. That is not because a financial institution served as an intermediary (as financial institutions do in nearly all financial transactions), but rather because a financial institution was the *transferee from which the trustee sought recovery*. See 11 U.S.C. § 546(e) ("the trustee may not avoid a transfer . . . made by or to (or for the benefit of) a . . . financial institution").[4]

Petitioner's argument (at 37) that "[d]etermining the precise contours of the conduit principle could

---

[4] *Amici* Former Tribune and Lyondell Shareholders argue (at 18) that Section 550(a) should not bear on the scope of the exception in Section 546(e) because the former concerns only "transferees" of fraudulently conveyed property, while the latter "does not require that the Qualifying Entity be a 'transferee'" at all. But Section 546(e) concerns the trustee's attempt to "avoid a transfer," and there can be no "transfer" without both a "transferor" and a "transferee." In any event, because all Section 546(e) says is that "the trustee may not avoid a transfer" that meets the conditions then spelled out, the simplest and most textually supportable approach is to ask what transfer the trustee is seeking to avoid. If the trustee is neither seeking to take money from nor seeking to give money to a covered entity through the avoidance action, then Section 546(e)'s text has nothing to say about the matter.

require years of litigation" is therefore without merit. The analysis is simple: Is either the debtor or the entity from which the trustee seeks to recover a covered entity? If so, the exception applies; if not, it doesn't.[5]

B. Petitioner Misinterprets Section 546(e) And Would Vastly Expand The Exception's Narrow Exclusion From The Trustee's Avoidance Powers

Petitioner's primary textual argument to the contrary rests on the fact that Congress added the phrase "(or for the benefit of)" to Section 546(e) in 2006. According to Petitioner, that parenthetical would be unnecessary if the terms "by" or "to" required the covered entity to have a beneficial interest in the transferred property. Pet. Br. 16-20.

Petitioner's argument misses the point. The key question under Section 546(e) is whether a transaction is a "*transfer*" that is otherwise avoidable by the trustee. And as noted, such a "transfer" must

---

[5] In any event, there is no merit to Petitioner's suggestion that courts will be unable to define the contours of the conduit principle. There is already abundant case law on the "dominion or control" test used by numerous courts of appeals to determine whether a party qualifies as a transferee. *Matter of Coutee*, 984 F.2d 138, 140 (5th Cir. 1993) (per curiam) (collecting cases); see *Bonded Fin. Servs., Inc.* v. *European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988); see also Resp. Br. 36-39. Applying that authority makes clear that there is no merit to the suggestion by the *amici* Former Tribune and Lyondell Shareholders (at 9 n.3) that an intermediary in a financial transaction somehow has a beneficial interest in funds that simply passed through it.

be by a transferor (the debtor), and to a transferee (the entity from which the trustee seeks to recover). A financial institution that serves as a conduit is neither.

As discussed below, Congress added the "(or for the benefit of)" parenthetical to Section 546(e) in "technical changes" that it made to the provision in 2006. See *infra*, at 23, 24, 30. But that change was just a recognition that, in some cases, a transfer may be for the ultimate benefit of a financial institution, even if it is made to a non-covered entity. Suppose, for example, that Company C, a bank, guarantees Company A's loan to Company B, and Company B pays off the loan. In that situation, Company B's payment is "to" Company A and "for the benefit of" Company C (a covered entity)—and thus protected by the exception. The addition of "(or for the benefit of)" did not alter the meaning of "transfer" under Section 546(e). See also Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 No. 7 Bankr. L. Letter NL 1, July 2017, at 14 (describing other instances in which the "or for the benefit of" language would operate, and discussing parallel references in related provisions of the Bankruptcy Code).

Petitioner, however, begs the question of what constitutes a "transfer" within the meaning of Section 546(e). For example, Petitioner states that it is "undisputed" that the financial intermediaries here "made and received the *transfers* at issue."

Pet. Br. 15 (emphasis added).[6] But that's not undisputed. That's the central issue in this case: What constitutes a "transfer" that falls within the scope of Section 546(e)'s exception? The only thing undisputed is that the transfers that the trustee sought to avoid here were made *through* financial institutions. Petitioner simply assumes that *any* type of financial transaction qualifies as a "transfer" that "the trustee may not avoid."[7]

Indeed, Petitioner states that Section 546(e) protects "securities and commodities *transactions*." Pet. Br. 11 (emphasis added). Petitioner also states that Section 546(e) protects transactions "*involving* certain types of institutions against claims by bankruptcy trustees"—and repeatedly frames the relevant question as whether financial institutions are *involved*. *Ibid.* (emphasis added); see *id.* at 3, 15, 24, 30, 37, 38, 45, 46.

But Section 546(e) says nothing about "transactions"—it uses the term "transfers," an express

---

[6] Here, one of the financial institutions (Citizens Bank) served as escrow agent for the stock and land sales, and the other (Credit Suisse) loaned money to Valley View to purchase shares of Bedford Downs' stock.

[7] *Amici* Former Tribune and Lyondell Shareholders are likewise wrong when they assert (at 16) that Tribune and Lyondell "each made just one or two wire transfers to CTC and Citibank, respectively." The only "transfers" were those from the debtors (Tribune and Lyondell) to the ultimate transferees (the shareholders). There was no "transfer" between the debtors in those cases and CTC and Citibank, which served only as intermediaries in the transfer between the debtors and the transferees.

reference to the fraudulent transfers that are otherwise avoidable by the trustee under other provisions of the Code. Nor does Section 546(e) apply whenever financial institutions are simply "involved," somehow, in a transaction. Rather, it applies where the "transfer" that the trustee seeks to avoid is "by," "to," or "for the benefit of" a financial institution—that is, where the financial institution is the transferor or transferee within the meaning of the Code. Petitioner seeks to "rewrite the statute" to serve its purposes. *Hall*, 132 S. Ct. at 1893.

Petitioner's theory assumes that what the trustee seeks to avoid is not a single transfer between the debtor and ultimate transferee, but rather a *series of transfers—i.e.*, a transfer from the debtor *to* an intermediary financial institution; a transfer *from* that financial institution *to* another intermediary financial institution; and finally a transfer *from* that second financial institution *to* the ultimate transferee. See Pet. Br. 19-20 (stating that Credit Suisse "transferred the funds *to* Citizens," and that Citizens then transferred those funds "to Petitioner").

But if Petitioner were correct that the statute does not focus on the single transfer between the debtor and ultimate transferee, but rather on what it describes as a series of smaller transfers through intermediaries, then numerous provisions of the Code would be all but illusory. Section 547(b)(4)(B), for example, provides that the trustee can avoid a broader range of preferential transfers if the creditor at the time of the transfer was an "insider." Under Petitioner's hyper-granular interpretation of "transfer," however, there would be no such thing as

a transfer from a debtor to an insider (the focus of Section 547(a)(4)(B)). Rather, there would be a transfer from the debtor to an outside financial intermediary, and then from the financial intermediary to the creditor that is an insider/affiliate of the debtor.[8]

Similarly, Section 550(b) allows a subsequent transferee to assert a good-faith defense that is not available to the initial transferee. See Pet. Br. 29. Under Petitioner's view, however, nearly *everyone* would qualify as a subsequent transferee, because the initial transfer would be from the debtor to the financial intermediary; the subsequent transfer would then be from that intermediary to the ultimate beneficiary. In short, when the Code says that "the trustee may not avoid a transfer," it does not contemplate that *every* transaction in the asset-transfer chain between debtor and creditor, including

---

[8] In other words, Petitioner reads Section 546(e)'s reference to transfers "by or to" financial institutions to mean transfers that occur *through* financial institutions. But a transfer through a financial institution is not a transfer "by or to" a financial institution. An analogy illustrates the point. Imagine that a spectator sitting in a middle seat at a baseball game wants to purchase a hot dog from a vendor standing in the aisle. The spectator passes his money to a fan sitting on the aisle seat, and that fan hands the money to the vendor. The vendor then does the same thing with the hot dog, handing it to the fan in the aisle seat, who hands the hot dog to the spectator in the middle seat. If the spectator who purchased the hot dog wants his money back, would he ask the fan in the aisle seat to pay him back? No; he would ask the vendor for his money back. That is because the relevant transfer that he seeks to undo was a transfer to the vendor—even though the transfer happened to pass *through* the fan in the aisle seat.

transactions that simply pass *through* financial intermediaries, is a separate transfer to which the trustee brings a forbidden challenge.

Petitioner's interpretation of the exception, moreover, creates a gaping hole in that exception. In the vast majority of securities transactions, funds will necessarily pass *through* a financial institution en route to shareholders, bondholders, lenders or other ultimate transferees. By deeming that financial pit-stop sufficient to trigger Section 546(e)'s exception, Petitioner's rule would eviscerate the trustee's avoidance power with respect to a broad swath of fraudulent transfers. Petitioner has essentially written the constructive fraudulent transfer provisions out of the Code.

Petitioner effectively concedes as much. As the Seventh Circuit explained, Petitioner's view of Section 546(e) is "so broad as to render any transfer non-avoidable unless it were done in cold hard cash." Pet. App. 11. Even transactions by check or wire transfer (both of which would need to be processed by a financial institution) would fall within the exception. Petitioner's only response is that neither financial institution *in this case* "simply processed a check or a wire transfer on behalf of the buyer or seller," and that this "Court need not locate the outer reaches of the safe harbor to resolve this case." Pet. Br. 44, 45.[9]

---

[9] Petitioner also states that the Seventh Circuit's "concern that financial institutions are involved in some fashion in nearly every securities or commodities transaction, leaving no transfers to be avoided"—which Petitioner does not dispute—"is not a basis to deny coverage to financial institutions and parties

But Petitioner cannot duck the issue. Petitioner assumes that the singular purpose of Section 546(e) (pursued without regard to countervailing considerations) is to protect "large and complex" transactions, which, according to Petitioner, necessarily (and uniquely) *involve* financial institutions. Pet. Br. 11; see also *id.* at 2, 36. As we show below, that is not Section 546(e)'s purpose. But in any event, financial institutions are involved, in some way, in nearly *every* financial transaction—large or small, complex or simple. Even aside from the check-cashing and money-wiring scenarios posited by the Seventh Circuit, nearly every stock transfer between two individuals—be it one share, or a million—requires the involvement of a financial institution or other covered entity (to hold and exchange the stock for consideration).

Under Petitioner's theory, then, a trustee could not avoid *any* transfer (other than transfers made with fraudulent intent) involving stocks, bonds, commodities, electronic bank transfers—or even old-fashioned paper checks. That is an astonishingly broad (and wrong) interpretation of what is supposed to be a narrow *exception* to the trustee's avoidance powers under the Code. Indeed, Petitioner's theory deletes 400 years of fraudulent transfer law from the books (unless the transfer at issue was made with bags of cash).

---

with beneficial interests in transactions." Pet. Br. 14-15. But the Seventh Circuit's interpretation would *not* deny coverage to financial institutions with beneficial interests in a transfer and that are targeted by a trustee's avoidance action—it *includes* such transfers within the scope of the exception.

The same holds true for the impact of Petitioner's theory on the law of preferences. A fundamental precept of the Code is that creditors of equal rank should recover ratably. Where a debtor chooses to repay certain creditors on the eve of bankruptcy, such transfers are presumptively avoidable by the trustee as preferences under 11 U.S.C. § 547(b). Petitioners say that such preferred creditors should get to keep payments made on their debt—even if made only a day before a bankruptcy filing, and even if such creditors are friends, family members, or business relations of the debtor's management—while other creditors receive nothing, so long as (and only because) such creditors happen to be repaid using a financial institution as a mere conduit.

When interpreting a provision of the Code, courts must look to its "plain language, context, and structure." *Hall*, 132 S. Ct at 1893. More broadly, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Thus, "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Here, Section 546(e)'s exception is a limited exclusion from the expansive avoidance powers expressly conferred on the trustee by Sections 544, 545, 547, 548(a)(1)(B), and 548(b). Those avoidance

powers are among the most powerful tools in the trustee's arsenal—and promote the Code's goal of "maximizing property available to satisfy creditors" in the event of a bankruptcy. *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). Congress would not vitiate the avoidance powers expressly conferred on the trustee by multiple Code provisions by creating an exception so broad that it swallows the rule. Yet that is precisely what Petitioner's reading of Section 546(e) would do.

Congress does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Thus, if Congress had intended to limit the trustee's avoidance powers so dramatically "it could simply have said so." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). It didn't. This Court should therefore reject Petitioner's attempt to rewrite the exception in a way that would insulate nearly all constructive fraudulent transfers from avoidance by the trustee. See *New York State Dept. of Social Servs.* v. *Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

II. THE LEGISLATIVE HISTORY CONFIRMS THAT SECTION 546(e) DOES NOT PROTECT TRANSFERS CONDUCTED THROUGH FINANCIAL INSTITUTIONS

Section 546(e)'s legislative history confirms what its text makes clear: that the exception does not protect transfers in which a financial institution or other covered entity served as a mere conduit. Congress created the exception to address a specific

(and narrow) concern: the risk that clawing back funds from a party in the clearance and settlement system could lead to an insolvency that would, in turn, spread to other firms and lead to the collapse of the entire market. Those concerns are not implicated where, as here, a fraudulent transfer merely passed *through* a financial institution, as a conduit, en route to a defendant-transferee that is not such an institution at all.

A. Congress Enacted The Exception To Protect Against The Risk That The Bankruptcy Of One Commodities Or Securities Firm Could Spread To Other Firms

What is now Section 546(e) originated in a narrow provision first enacted as part of the Bankruptcy Code of 1978. In 1976, William Bagley, the Chairman of the Commodity Futures Trading Commission (CFTC), wrote to Congress with concerns regarding "the treatment which commodity customers will be accorded by a trustee in bankruptcy." *H.R. 31 and H.R. 32, Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 94th Cong., 2d Sess. ("Bankr. Act Rev."), at 2378 (1976). One such concern involved "the treatment by [a] trustee of margin deposits and payments made to a clearing house" in "the event of the bankruptcy of a futures commission merchant." *Id.* at 2405-06.

Chairman Bagley's concerns were prompted by the decision in *Seligson* v. *N.Y. Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975). In that case, the trustee of a bankrupt commodities broker brought

suit against a commodities exchange (the New York Produce Exchange) and a commodities clearing house association (the New York Produce Exchange Clearing Association) to recover alleged fraudulent conveyances of margin payments made on oil-seed futures. The court denied the clearing association's motion for summary judgment, making the clearing association itself potentially liable for millions of dollars. *Id.* at 136.

Clearing houses facilitate financial transactions—in the case of commodities futures, for example, by holding margin payments from the parties to ensure that the party on the profitable side of the transaction will receive its profit. Chairman Bagley explained that, by making clearing houses liable for margin payments, the court's decision in *Seligson* "severely threatened" the "financial stability" of clearing houses, which are critical to the function of the commodities futures market. Bankr. Act Rev. at 2406. Chairman Bagley therefore asked Congress to ensure that margin payments made to or with a clearing house or other futures commission merchant "be protected from reversal by the trustee in bankruptcy." *Ibid.*

Congress obliged. Section 764(c) of the newly enacted Code provided that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, § 764(c), 92 Stat. 2549 (1978). The House Report acknowledged that the provision was "derived largely from" Chairman Bagley's letter, H.R. Rep. No. 95-595, at 271-73 (1977), reprinted in 1978 U.S.C.C.A.N.

5963, 6229-31, and the Senate Report stated that the exception "overrules *Seligson*," S. Rep. No. 95-989, at 106 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5794.[10] As the Senate Report also explained, the policy of the provision, which protected margin payments to clearing organizations from avoidance by the trustee, was to "promote customer confidence in commodity markets" and to protect commodity market stability by preventing a "ripple effect that disrupts the entire market." S. Rep. No. 95-989, at 8.

In 1982, Congress revisited the exception to preserve further "the financial integrity of the nation's commodity and securities markets," H.R. Rep. No. 96-1195, at 7 (1980), and to "minimize the displacement caused in the commodities and securities market in the event of a major bankruptcy affecting those industries," H.R. Rep. No. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583. As the 1982 House Report on the amendments explained:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.

---

[10] See also 5-546 Collier on Bankruptcy ¶ 546.LH[5] & nn.36, 37 (16th ed. 2017) (stating that Congress enacted Section 764(c) "[i]n response" to *Seligson*).

H.R. Rep. No. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583.

The 1978 Act "provide[d] certain protections to the commodities market to protect against such a 'ripple effect'"—namely by precluding a trustee from avoiding margin payments made to a commodity broker. *Ibid.* That Act did not, however, expressly apply to the securities industry. To remedy that omission, the 1982 amendments sought "to clarify and, in some instances, broaden the commodities market protections and expressly extend similar protections to the securities market." *Id.* at 2.[11] Accordingly, Congress replaced Section 764(c) with Section 546(d), and that new subsection provided that "the trustee may not avoid a transfer that is a margin payment, . . . or settlement payment, . . . made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." Pub. L. No. 97-222, § 4, 96 Stat. 235 (1982).

In 1984, Congress added "financial institution[s]" to the exception and moved it from Section 546(d) to Section 546(e), where it remains today. See Pub. L. No. 98-353, § 351(2), § 461, 98 Stat. 333 (1984). And once again the legislative history made clear that the

---

[11] See *Bevill, Bresler & Schulman Asset Mgmt. Corp.* v. *Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 747 (3d Cir. 1989) (when it enacted the 1982 amendments, "Congress was concerned about the volatile nature of the commodities and securities markets"); *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 B.R. 655, 664 (N.D. Ill. 1991) ("Congress exempted settlement payments in the commodities (and later the securities) industry out of concern that the bankruptcy of one party in the clearance and settlement chain could spread to other parties in that chain.").

principal objective of the exception was "to prevent the insolvency of one commodities or securities firm from spreading to other firms and possibly threatening the stability of the affected market." S. Rep. No. 98-65, at 47 (1983).

Congress added "financial participant[s]" to the list of covered entities in 2005. Pub. L. No. 109-8, § 907(o)(3), 119 Stat. 23 (2005). When Congress made that addition, the 2005 House Report again emphasized that the purpose of the new provisions was to "reduce 'systemic risk' in the banking system and financial marketplace." H.R. Rep. No. 109-31(I), at 20 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 105; see *id.* at 3, 89 (likewise referring to reduction in "systemic risk").

Congress amended Section 546(e) most recently in 2006. Among other things, that legislation added the parenthetical phrase "(or for the benefit of)" after the phrase "by or to." Pub. L. No. 109-390, § 5(b)(1), 120 Stat. 2692 (2006).[12] The legislative history says nothing about why Congress added that parenthetical. The House Report accompanying the amendments, however, stated that the bill makes only "*technical changes* to the netting and financial contract provisions incorporated by Title IX of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, to update the language to reflect current market and regulatory practices, *and help reduce systemic risk in*

---

[12] Congress also added the parenthetical phrase "(or for the benefit of)" after "by or to" in Sections 546(f), (g), and (i). See Pub. L. No. 109-390, § 5(b)(2), (3), and (4), 120 Stat. 2692.

the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency." H.R. Rep. No. 109-648, at 1-2 (2006), reprinted in 2006 U.S.C.C.A.N. 1585, 1585-87 (emphasis added).[13]

As Respondent observes (at 52-53), the most likely explanation for Congress's addition of "(or for the benefit of)" is simply that it wanted to make Section 546(e) consistent with the avoidance provisions to which that section is an exception. Both Sections 547(b) and 548(a) permit the avoidance of certain transfers made "for the benefit" of creditors. Without the addition of that same language to Section 546(e), a trustee might have been able to avoid a transfer that was made for the benefit of a financial institution even though it could not have avoided that very same transfer had it been made directly by or to that institution. See Brubaker, *supra*, at 14-15. Closing such a gap is the kind of "technical amendment" Congress thought it was making.

B. The Problem Section 546(e) Addresses Is Not Implicated Where Neither The Debtor Nor The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity

1. Section 546(e)'s legislative history makes clear that Congress enacted the exception to prevent the bankruptcy of one entity in the clearance and

---

[13] Title IX includes the "Bankruptcy Law Amendments," including amendments to Section 546(e). Pub. L. No. 109-8, § 907(e), 119 Stat. 23 (2005).

settlement system from spreading to other entities in that system. "The securities industry," like the commodities industry at issue in *Seligson*, "utilizes a clearance and settlement system, wherein parties use intermediaries to make trades of public stock which are instantaneously credited, but in which the actual exchange of stock and consideration therefor takes place at a later date." *Zahn* v. *Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998) (internal quotation marks omitted).

That system "depends upon a series of guarantees, made by all parties in the chain, that they will live up to their obligations regardless of a default by another party in the chain." *Id.* at 676. If the "pre-bankruptcy trades by a bankrupt intermediary could be set aside, then the guarantees that allow the system to function would be threatened, the parties could not proceed with confidence, and a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry." *Ibid.*

Those concerns are implicated where, as in the *Seligson* case that prompted Congress to enact the exception, a trustee brings an avoidance action directly *against* a commodities clearing association (or other covered entity) in its proprietary capacity. But those concerns are not implicated where, as here, a transfer between two non-covered entities simply *involves* a financial institution that is neither the debtor nor the ultimate transferee. The trustee in this case does not seek *anything* from the intermediary financial institutions that facilitated the transfer at issue. Rather, the trustee seeks to recover money from a shareholder (a non-covered

entity), and return it to the estate of the debtor (another non-covered entity).

Such avoidance actions directed at "payments to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves," do not implicate the "systemic risk" that concerned Congress. *In re Lyondell Chem. Co.*, 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014). That is because "[t]he inviolability of payments to shareholders is simply not basic to the operation of the clearance and settlement systems" that Section 546(e) seeks to protect. *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 B.R. 655, 664 n.11 (N.D. Ill. 1991) (internal quotation marks omitted).[14]

Petitioner, however, would protect from avoidance nearly any constructive fraudulent transfer that simply passes through a financial intermediary en route to the ultimate transferee. As noted, that means that nearly *every* securities transaction would fall within Section 546(e)'s scope, since nearly every transaction *involves* a covered entity in some capacity. Petitioner's theory therefore amounts to an assertion that Congress intended to give those who benefit from fraudulent transfers a free pass.

---

[14] If the avoidance of transfers that merely *involved* financial entities implicated the systemic risk that motivated Congress to enact Section 546(e), one would have expected the United States to have filed a brief in support of Petitioner. It did not do so.

And the few (if any) financial transactions that don't fall within the sweep of the exception under Petitioner's theory can readily be brought within Section 546(e)'s reach by someone seeking to make a fraudulent transfer without potential liability.[15] Indeed, Petitioner's interpretation, if accepted, "would serve to sanction the practice of structuring private stock purchases in an effort to circumvent the avoidance section, merely by utilizing a financial institution" in some way. *Zahn*, 218 B.R. at 677 (internal quotation marks omitted); see also Irving E. Walker & G. David Dean, *Structuring a Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16, 72 (2009) (advising practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds . . . may be exempted from avoidance").

This Court has recognized that "maximizing property available to satisfy creditors" is a core purpose of the Code's avoidance provisions. *Bank of Am. Nat'l Tr.*, 526 U.S. at 453. Petitioner, however, would expand Section 546(e)'s narrow exception to the trustee's avoidance powers so that it swallows the rule—hindering the trustee's ability to avoid nearly all constructive fraudulent transfers. That reading not only conflicts with the text, context, and

---

[15] Even fraudulent cash transfers could be protected by Petitioner's reading of the exception if such transfers go through an escrow agent that is a covered entity. See Br. of Former Tribune and Lyondell Shareholders Amici at 11 (stating that a deposit of funds with an escrow agent in a home sale is a transfer "to" that agent).

history of Section 546(e) itself—which make clear that Section 546(e) does not go nearly that far—but also undermines Congress's goal of maximizing and equalizing recovery to creditors.

Indeed, Petitioner essentially acknowledges as much, asserting that the Seventh Circuit's interpretation "would not protect smaller market players, including individual investors, their retirement plans, investment clubs, and employee stock ownership trusts." Pet. Br. 35. *Amici* Former Tribune and Lyondell Shareholders go so far as to state (at 10) that, "even if a bankruptcy trustee could avoid a transfer only as to the ultimate owner, without disrupting any other part of the transaction, that alone would create uncertainty and risk in the capital markets and thus raise the cost of capital."

But Congress did not enact Section 546(e) to protect *investors*—much less investors enriched through fraudulent transfers. Rather, Congress sought to protect *financial institutions* themselves—specifically, by reducing the risk that the bankruptcy of one financial institution spreads to another financial institution. The whole purpose of the avoidance powers that the Code confers on the trustee is to *prevent* investors from benefiting from fraudulent transfers at the expense of creditors. Yet Petitioner and its *amici* seek a rule that would inoculate individual investors (and indeed, all investors) from virtually all constructive fraudulent conveyance actions.[16]

---

[16] Petitioner's argument that the exception should protect small, individual investors is also at odds with its assertion that

As noted, the Bankruptcy Code promotes multiple, sometimes competing, purposes, *RadLAX*, 132 S. Ct. at 2073, and "it is not for courts to alter the balance struck by the statute," *Law* v. *Siegel*, 134 S. Ct. 1188, 1198 (2014). Thus, a court's task in interpreting the Code is to determine *how far* a provision goes in the service of the multiple policies served by the Code. Here, however, Petitioner not only gets Section 546(e)'s purpose wrong (by asserting that the exception is meant to protect all investors); it then elevates that perceived policy at the near-total expense of the Code's express goal of returning fraudulent transfers to their rightful owner and maximizing recovery to creditors.

2. Petitioner does not seriously dispute that Congress enacted Section 546(e) to protect against systemic risk in the securities and commodities industries. Instead, it suggests that Congress's intent when first enacting the exception is simply no longer relevant in light of the fact that the provision has been amended several times. See Pet. Br. 40-41.

Congress sought to protect transfers involving financial institutions because the "involvement of financial institutions, stockbrokers, securities clearing agencies, and the like is an indication that a securities or commodities transaction is *sufficiently large and complex*" as to warrant protection from avoidance. Pet. Br. 11 (emphasis added). As noted, the purpose of the exception is not to protect "large and complex" transactions. But in any event, as Petitioner effectively concedes, the involvement of financial institutions in a securities or commodities transaction is *not* an indication that the transaction is large and complex; it is just an indication that there *was a securities or commodities transaction* at all.

But as shown above, *every time* that Congress amended the provision, it reiterated that the purpose of the exception remained the same: to prevent against the systemic risk that could result if the insolvency of one securities or commodity firm spread to others. Congress expanded the *types* of institutions that are covered by Section 546(e), to reflect current market realities better, but it never departed from the provision's core purpose of protecting from avoidance a narrow subset of transfers that, if avoided, could threaten the stability of the commodities and securities industries.[17]

When Congress added the "(or for the benefit of)" parenthetical in 2006, moreover, it did so as part of amendments that it characterized as mere "technical changes." H.R. Rep. No. 109-648, at 1-2 (2006), reprinted in 2006 U.S.C.C.A.N. 1585, 1585-87. And, as noted above, that addition simply clarified a minor point—namely that a transfer can fall within the scope of the exception if it is made for the benefit of a covered entity, even if not made directly to that covered entity. If Congress had meant that minor change to effect a sweeping change to the scope of Section 546(e), the legislative history would say something quite different.

Petitioner next suggests that the Seventh Circuit's decision "creates uncertainty" by requiring

---

[17] Petitioner protests (at 42) that "Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address." But as noted, Petitioner's reading of the exception wouldn't merely be "broader" than necessary—it would effectively render illusory the avoidance powers conferred on the trustee by multiple Code provisions.

a case-by-case analysis of whether unwinding a specific fraudulent transfer would "create a 'ripple effect through the financial markets.'" Pet. Br. 38 (quoting Pet. App. 15). According to Petitioner, the "Seventh Circuit did not identify the degree of 'ripple effect' that would be sufficient to justify protecting a transaction"—leaving courts without any guiding principle. *Ibid.*

Petitioner attempts to sow confusion where none exists. The Seventh Circuit did *not*, as Petitioner suggests, call for a case-by-case judicial examination of the systemic risk posed by a particular transaction. Rather, the Seventh Circuit simply addressed the problem that Congress enacted the exception to remedy, and explained why Congress's expressed concern about systemic risk helps justify construing the statute to protect only those transfers in which financial institutions are at the ends of the asset-transfer chain, and not mere conduits: In light of Congress's purpose for enacting Section 546(e), the court explained, "[w]e will not interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." Pet. App. 16; see *id.* at 14 ("The safe harbor has ample work to do when an entity involved in the commodities trade is a debtor or actual recipient of a transfer, rather than simply a conduit for funds.").

Finally, Petitioner contends that the "non-conduit requirement would render the inclusion of securities clearing agencies in the safe harbor meaningless." Pet. Br. 25. *Amici* Former Tribune and Lyondell Shareholders likewise suggest (at 20-21) that, under

the non-conduit theory, the transfers at issue in *Seligson* would not be protected by the exception.

Of course they would. As noted, Congress enacted the exception in 1982 to prevent the outcome in *Seligson*, in which the court allowed to go forward a trustee's suit *against a commodities clearing house* itself. 394 F. Supp. at 136. That action—and Petitioner's hypothetical scenario involving a trustee's avoidance action against a securities clearing house—would fall squarely within Section 546(e)'s scope. That is because the trustee's avoidance actions in those scenarios would seek to recover property *directly from the covered entity*. As explained above, that is exactly what Section 546(e) prohibits.

Thus, when Petitioner says (at 26) that, under the non-conduit theory, the statute "would provide no protection to the clearing agency or to the ultimate recipients of funds handled by the clearing agency," Petitioner is half right. The statute *would* provide protection *to the clearing agency* if the trustee sought to recover funds directly from the clearing agency. But the statute would *not* protect the ultimate recipient of the funds that were once simply "handled" by the clearing agency—unless, of course, that ultimate recipient at the end of the asset-transfer chain is itself a financial institution or covered entity.

The text, context, structure, and history of Section 546(e) all compel the same conclusion: The exception applies only where the debtor or the transferee from which the trustee seeks to recover is a covered entity. Petitioner's interpretation—which would protect from avoidance virtually all non-cash

fraudulent transfers, would stretch Section 546(e)'s narrow exception past the breaking point.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JAY TEITELBAUM
TEITELBAUM LAW GROUP, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

September 2017

RECORD
AND
BRIEF

No. 16-784

Supreme Court, U.S.
FILED
JUL 20 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,
Petitioner,

v.

FTI CONSULTING, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR VARIOUS FORMER TRIBUNE AND LYONDELL SHAREHOLDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP
2099 Pennsylvania Ave., NW
Washington, DC 20006

D. ROSS MARTIN
JOSHUA Y. STURM
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036-8704

Counsel for Certain Tribune Defendants

PHILIP D. ANKER
Counsel of Record
ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8890
philip.anker@wilmerhale.com

JOEL MILLAR
DAVID M. LEHN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Counsel for Certain Tribune (Creditor Actions) and Lyondell Defendants

GREGORY L. DEMERS
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Counsel for Certain Tribune Defendants

MARK A. NEUBAUER
CARLTON FIELDS JORDEN BURT, LLP
2000 Avenue of the Stars
Suite 530N
Los Angeles, CA 90067
Counsel for Certain Tribune Defendants

ELLIOT MOSKOWITZ
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
Counsel for Certain Tribune Defendants

ALAN J. STONE
ANDREW M. LEBLANC
MILBANK, TWEED, HADLEY & MCCLOY LLP
28 Liberty Street
New York, NY 10005
Counsel for Certain Tribune Defendants

CHARLES FRIED
1585 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Certain Tribune Defendants

DAVID C. BOHAN
JOHN P. SIEGER
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661
Counsel for Certain Tribune Defendants

MATTHEW D. MCGILL
OSCAR GARZA
DOUGLAS LEVIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
Counsel for Certain Tribune Defendants

MICHAEL S. DOLUISIO
STUART T. STEINBERG
ELLEN L. MOSSMAN
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
Counsel for Certain Tribune and Lyondell Defendants

ANDREW J. ENTWISTLE
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 20th Floor
New York, NY 10171
Counsel for Certain Tribune and Lyondell Defendants

GREGG M. MASHBERG
STEPHEN L. RATNER
DAVID S. MORDKOFF
PROSKAUER ROSE LLP
11 Times Square
New York, NY 10036
Counsel for Certain Tribune and Lyondell Defendants

MATTHEW L. FORNSHELL
DANIEL R. SWETNAM
ICE MILLER LLP
250 West Street
Columbus, OH 43215
Counsel for Certain Tribune and Lyondell Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Seventh Circuit Disregarded The Effect Of Its Narrow Reading Of §546(e) On Large, Public-Company Transactions 4

II. The Bankruptcy Code's Text And Structure Make Clear That Section 546(e)'s Safe Harbor Applies Where A Qualifying Entity Acts Only As An Intermediary 11

A. The Text Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is Only An Intermediary 11

B. The Structure Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is An Intermediary 16

III. The Seventh Circuit's Narrow Reading Of §546(e) Threatens The Stability Of Securities Markets And Discourages Investment 24

A. Congress's Purpose In Enacting §546(e) Was Not Only To Protect Qualifying Entities From Liability, But Also To Protect Settlement Finality And Market Stability 24

TABLE OF CONTENTS—Continued

Page

B. The Seventh Circuit's Narrow Construction Of §546(e) Would Destabilize Securities Markets By Unwinding Long-Settled, Complicated Transactions And Creating Arbitrary Distinctions Among Market Participants 27

C. Eliminating The Section 546(e) Safe Harbor For Transfers Through Intermediaries Would Erode Investor Confidence, Discourage Public Investment, And Reduce Liquidity 30

D. At A Minimum, The Court Should Reserve Decision On §546(e)'s Application To Transfers Involving Securities Settled Through The Public Company Clearing And Settlement System 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Page(s)

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 32

Bonded Financial Services v. *European American Bank*, 838 F.2d 890 (7th Cir. 1988) 18, 19, 20

Chadbourne & Parke LLP v. *Troice*, 134 S. Ct. 1058 (2014) 30

Contemporary Industrial Corp. v. *Frost*, 564 F.3d 981 (8th Cir. 2009) 13

Enron Creditors Recovery Corp. v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011) 9, 29

Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 11, 19

In re AgriProcessors, Inc., 859 F.3d 599 (8th Cir. 2017) 20

In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 130 F.3d 52 (2d Cir. 1997) 18, 19

In re Frank Santora Equipment Corp., 256 B.R. 354 (Bankr. E.D.N.Y. 2000) 33

In re Harbour, 845 F.2d 1254 (4th Cir. 1988) 20

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006) 20

In re Kaiser Steel Corp., 110 B.R. 514 (D. Colo. 1990) 20

In re Kaiser Steel Corp., 952 F.2d 1230 (10th Cir. 1991) 9, 13, 18, 23, 25

TABLE OF AUTHORITIES—Continued

Page(s)

In re Lyondell Chemical Co., 554 B.R. 635 (S.D.N.Y. 2016) 33

In re Manhattan Investment Fund Ltd., 397 B.R. 1 (S.D.N.Y. 2007) 20

In re Munford, Inc., 98 F.3d 604 (11th Cir. 1996) 14, 19

In re Norstan Apparel Shops, Inc., 367 B.R. 68 (Bankr. E.D.N.Y. 2007) 34

In re QSI Holdings, Inc., 571 F.3d 545 (6th Cir. 2009) 13

In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013) 13, 16, 26

In re Resorts International, Inc., 181 F.3d 505 (3d Cir. 1999) 9, 13

In re Southern Independent Banking Corp., 126 B.R. 294 (E.D. Tenn. 1991) 20

In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d Cir. 2016) ..... *passim*

Jones v. *Harris Associates L.P.*, 559 U.S. 335 (2010) 9

Kaiser Steel Corp. v. *Charles Schwab & Co.*, 913 F.2d 846 (10th Cir. 1990) 13, 25

McDonnell v. *United States*, 136 S. Ct. 2355 (2016) 34

Peterson v. *Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013) 31

Russello v. *United States*, 464 U.S. 16 (1983) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Seligson v. *New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975) 20

Stoneridge Investment Partners, LLC v. *Scientific-Atlanta*, 552 U.S. 148 (2008) 30

STATUTES, RULES, AND REGULATIONS

11 U.S.C.
§101 ..... 17, 29
§544 33
§546 ..... *passim*
§547 ..... 18, 24
§548 ..... 3, 18, 23, 24, 32
§550 ..... 18, 19, 20, 21, 22, 24, 27
§555 22
§741 17
§761 17

15 U.S.C.
§78c 17
§78q-1 ..... 7, 17, 25

28 U.S.C. §1002 9

Pub. L. No. 95-598, 92 Stat. 2549 (1978) 21

Pub. L. No. 97-222, 96 Stat. 235 (1982) 21

Pub. L. No. 98-353, 98 Stat. 333 (1984) 34

Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, 120 Stat. 2692 13

SEC, *Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, 69 Fed. Reg. 70,852 (Dec. 7, 2004) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Self-Regulatory Organizations, Exchange Act Release No. 47,978, 2003 WL 21288541 (June 4, 2003) 7, 8

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-595 (1977) 18, 21, 26

H.R. Rep. No. 97-420 (1982) 10, 24, 25, 26, 27, 34

H.R. Rep. No. 101-484 (1990) 25

S. Rep. No. 95-989 (1978) 18, 21

S. Rep. No. 104-98 (1995) 30

Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary, 94th Cong., Supp. App. pt. 4 (1976) 25

128 Cong. Rec. 15,980 (1982) 34

OTHER AUTHORITIES

5 *Collier on Bankruptcy* (16th ed.) 21

Depository Trust Co., *Rules, By-Laws, and Organization Certificate* (July 2017), www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf 7

Historical Price Table for Lyondell Chemical Co. 10/22/07 to 12/21/07, Bloomberg LP 31

Historical Price Table for Tribune Co. 10/08/07 to 12/07/07, Bloomberg LP 31

Restatement (Third) of Trusts (2007) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Rocha, Euan, *Basell to Buy Lyondell for Almost $13 Billion*, Reuters (July 17, 2007), *at* http://www.reuters.com/article/us-lyondell-basell-idUSN1740049020070717 5

Uniform Commercial Code
§8-102 8
§8-115 cmt. 4 8
§8-503 cmt. 2 8
§8-504 7

IN THE

Supreme Court of the United States

No. 16-784

MERIT MANAGEMENT GROUP, LP,
Petitioner,

v.

FTI CONSULTING, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR VARIOUS FORMER TRIBUNE AND LYONDELL SHAREHOLDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

Amici are various former shareholders of the Tribune Company ("Tribune") and Lyondell Chemical Company ("Lyondell") whose shares were repurchased in multi-billion dollar public-market securities transactions. Amici are currently defendants in constructive fraudulent-transfer actions where the creditor-plaintiffs seek to avoid and recover the settlement payments for amici's shares.

[1] No party's counsel authored this brief in whole or part, and no party or their counsel contributed monetarily to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk of the Court.

Amici moved to dismiss the cases against them, arguing that the constructive fraudulent-transfer claims were barred by Bankruptcy Code §546(e), which provides a safe harbor against avoidance of securities-settlement payments "made by or to (or for the benefit of)" specified categories of participants in the securities markets, including clearing agencies, stockbrokers, and financial institutions (collectively, "Qualifying Entities"). The repurchase of amici's securities occurred through a complex public securities clearance and settlement system and required transfers by and to numerous Qualifying Entities acting as intermediaries.

The Second Circuit held that §546(e) barred the constructive fraudulent-transfer claims to avoid the Tribune settlement payments. *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016). Thereafter, the bankruptcy court recommended dismissal of the similar claims to avoid the Lyondell settlement payments. *Weisfelner* v. *Fund 1*, No. 10-4609 (Bankr. S.D.N.Y. July 20, 2016) (ECF 2414); *Weisfelner* v. *Reichman*, No. 12-1570 (Bankr. S.D.N.Y. July 20, 2016) (ECF 118). But the *Tribune* plaintiffs filed a petition for certiorari (still pending), arguing that §546(e) does not apply if the Qualifying Entity acted only as an intermediary, without a beneficial interest in the settlement payments. No. 16-317 (Sept. 9, 2016). And the district court has held in abeyance the bankruptcy court's recommendation in *Lyondell*, evidently awaiting this Court's disposition of this case. Additionally, in another action, the Tribune litigation trustee recently sought leave to assert its own constructive fraudulent-conveyance claim against the Tribune defendants should this Court affirm in this case. The outcome here could thus materially affect amici.

SUMMARY OF ARGUMENT

Unless the bankruptcy trustee shows that the debtor actually intended to hinder, delay or defraud creditors under Bankruptcy Code §548(a)(1)(A), §546(e) bars the trustee from bringing a fraudulent-transfer claim to "avoid" (unwind) securities-settlement payments "made by or to (or for the benefit of)" a Qualifying Entity, all of which exclusively or typically act as intermediaries between securities issuers and investors. Section §546(e)'s safe harbor expressly applies whenever a settlement payment is made "by" or "to" a Qualifying Entity, even if it had no beneficial interest in the securities or the settlement payment.

The Seventh Circuit's view that the safe harbor applies only where the Qualifying Entity had a beneficial interest in the transferred property cannot be squared with the Bankruptcy Code's text and structure. That interpretation converts the phrase "for the benefit of" into a universal requirement, rather than one of three alternative bases for triggering the safe harbor, which makes "by or to" superfluous. It also fails to recognize that most Qualifying Entities serve exclusively or predominantly as intermediaries; it would have made no sense for Congress to tie the safe harbor to such entities' involvement if the safe harbor applied only if the entities were the ultimate owners of the property. Further, if the court below were right that Congress sought only to protect Qualifying Entities' own balance sheets, it would not (among other things) have extended the safe harbor to transfers "by" such entities.

By providing a safe harbor for all securities transfers settled using Qualifying Entities, Congress ensured the finality of settled securities transactions and

promoted market stability. Congress recognized that allowing plaintiffs to unwind settled securities transactions years later with easily alleged constructive fraudulent-conveyance claims would destabilize the market by exposing investors and intermediaries to increased risk and thereby discourage investment and capital formation. Nothing in the statutory text or congressional purpose supports the court of appeals' added limitation on the safe harbor, which would create arbitrary distinctions among similarly situated investors.

Recognizing the complex web of transactions among clearing agencies, brokers, and other intermediaries lying at the center of the modern securities settlement system, Congress provided that securities payments settled through Qualifying Entities cannot be avoided based solely on allegations of constructive fraudulent conveyance. Although the court of appeals believed Congress's concerns were not implicated by the *Merit Management* transaction, the court ignored the central role of financial intermediaries in that transaction. In any event, Congress's concerns are undoubtedly implicated in cases like *Tribune* and *Lyondell*, where plaintiffs seek to undo billion-dollar transfers, with payments to thousands of shareholders settled through the complex national clearance and settlement system nearly a decade earlier.

ARGUMENT

I. THE SEVENTH CIRCUIT DISREGARDED THE EFFECT OF ITS NARROW READING OF §546(e) ON LARGE, PUBLIC-COMPANY TRANSACTIONS

The Seventh Circuit relied excessively on the facts of the small, private-market transaction before it, while ignoring the implications for the public securities mar-

kets of applying its interpretation of §546(e) to far larger, more complex securities transactions. The multi-billion dollar repurchases of Tribune and Lyondell shares illustrate why the Seventh Circuit's rule would dramatically destabilize the public securities markets if applied in cases like *Tribune* and *Lyondell*.

A. Tribune was one of the world's largest media companies, and Lyondell was one of the world's largest petrochemical companies. Their stocks traded on national exchanges and were included in the S&P 500 (Tribune) and S&P midcap 400 (Lyondell) indices. Their shares were held by thousands of investors, including mutual funds, pension funds, employees, investment trusts, and individuals. In 2007, substantially all publicly held shares in Tribune and Lyondell were repurchased in transactions that took each of the companies private. Tribune and Lyondell shareholders received approximately $8.2 billion and $12.5 billion, respectively. Tribune and Lyondell filed extensive public disclosures regarding the transactions, which were also followed closely in the press.[2]

Following the 2008 financial crisis, both companies filed for reorganization under Chapter 11 of the Bankruptcy Code. Thereafter, creditor representatives filed actions to avoid and recover as fraudulent-transfers the payments made to amici and thousands of other former Tribune and Lyondell shareholders for their stock.

---

[2] *See, e.g.*, Tribune Co., Form 8-K (Apr. 1, 2007); Lyondell Chem. Co., Form 8-K (July 16, 2007); Fifth Am. Compl. ¶¶ 244-57, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-MD-2296 (S.D.N.Y. Aug. 2, 2013) (ECF 2701) (highlighting press reactions); Rocha, *Basell to Buy Lyondell for Almost $13 Billion*, Reuters (July 17, 2007), *at* http://www.reuters.com/article/us-lyondell-basell-idUSN1740049020070717.

Because the companies' shares traded publicly and were widely held, the Tribune and Lyondell transactions were accomplished using the national securities clearance and settlement system at the heart of §546(e)'s protection. Settlement payments to the ultimate owners of Tribune and Lyondell shares had to be transferred "by" and "to" numerous Qualifying Entities.

The Tribune transaction took place in two steps. First, Tribune initiated a public tender offer, depositing $4.24 billion with Computershare Trust Company ("CTC"), a financial institution acting as Tribune's paying agent. Tribune Co., Schedule TO at Ex-99 (a)(1)(A) 73, 81-82 (Form SC TO-I) (Apr. 25, 2007). Second, several months later, Tribune deposited approximately $4 billion more with CTC. In both steps, CTC distributed the proceeds to the record owners of Tribune shares, primarily the Depository Trust Company ("DTC"), the nation's central securities depository. *Tribune*, 818 F.3d at 106. The great bulk of Tribune shares were on deposit at DTC, and DTC distributed the funds to Participants (described below), which, in turn, directly or indirectly transferred the funds to the ultimate owners.

In *Lyondell*, payments to thousands of shareholders were likewise transferred "by" and "to" numerous levels of intermediaries in the public securities market, including those listed in §546(e). Loans provided to Lyondell by financial institutions were transferred to Citibank, another financial institution, which acted as "paying agent." Payments were then made by Citibank to the record holders for the shares. Many record holders, in turn, were themselves intermediaries—stockbrokers or other financial institutions—holding Lyondell stock for their customers, who might be the ultimate owners or intermediaries themselves. As in

Tribune, for the vast majority of shares, DTC acted as clearing agency to settle the exchange.

B. The processing of the Tribune and Lyondell transactions illustrates the complexity of the modern "indirect holding" system, by which publicly traded securities are deposited at DTC, acting as a clearing agency, and interests in the securities are held by tiers of stockbrokers and financial institutions (banks), acting as intermediaries on behalf of their retail and institutional customers, who may be intermediaries themselves or who may have the ultimate interests in the assets.

DTC is registered as a "clearing agency" by the Securities and Exchange Commission ("SEC") to facilitate the "prompt and accurate" processing of securities transactions on behalf of the major banks and broker-dealers that constitute its "Participants." *See* 15 U.S.C. §78q-1(b)(3). Participants deposit at DTC the underlying securities, which are registered in the name of DTC's nominee, Cede & Co. Cede thus becomes the record (legal) owner holding title to the deposited securities, which are held by DTC in "fungible bulk," meaning that each Participant has a pro rata interest in DTC's entire inventory for that issue, but no Participant has an ownership interest in any particular security on deposit. Self-Regulatory Organizations, Exchange Act Release No. 47,978, 2003 WL 21288541, at *7 (June 4, 2003) ("SEC Order"); Uniform Commercial Code ("UCC") §8-504(a); Depository Trust Co., *Rules, By-Laws, and Organization Certificate*, Rules 2(1), 3(1), 4(1) (July 2017). Securities on deposit at DTC are currently valued at approximately $37 trillion.

In depositing securities at DTC, Participants may be acting for their own account, or, as is typically the

case, acting for their customers. Transfers of ownership interests in publicly traded securities deposited at DTC are cleared at DTC's affiliate, the National Securities Clearing Corporation, and settled at DTC by means of automated book entry movements in Participants' DTC accounts. Participants, in turn, adjust the accounts of their respective customers to reflect the transactions, and the process is repeated through the tiers of ownership interests, until the account of the ultimate owner is reached. The indirect holding system is designed to dispense with the need to transfer or reissue physical shares, which facilitates a huge volume of transactions. *See* SEC Order, 2003 WL 21288541, at *6.

Ownership of securities held through the indirect holding system is governed by state law, in accordance with Article 8 of the UCC, which provides for a system of "security entitlements," i.e., "the rights and property interest of a person who holds securities or other financial assets through a securities intermediary." UCC §8-102(17); *see* UCC §8-115 cmt. 4; UCC §8-503 cmt. 2. Individual investors have securities entitlements against their banks or brokers, which may be DTC Participants or may have deposited the securities with DTC Participants, in which case the bank or broker would have a securities entitlement against the Participant. The Participants would then have securities entitlements against DTC. Significantly, DTC does not know whether its Participants are acting for themselves or customers, or the identity of the ultimate owners. In many instances, as in *Tribune* and *Lyondell*, there may be several tiers of securities intermediaries between DTC and the ultimate owners. At each tier, the enti-

tlement holder has only a securities entitlement against its securities intermediary.[3]

Parties at various steps of the process may hold their interests in various ways. A bank may hold shares for its customers, *In re Resorts Int'l, Inc.*, 181 F.3d 505, 508-509 (3d Cir. 1999); *Enron Creds. Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329, 331 (2d Cir. 2011); a mutual fund may hold shares, and its investors may hold shares in the fund, *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010); a broker may be the record holder of shares for a retiree's 401(k) retirement account, *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1237-1238, 1240 n.11 (10th Cir. 1991); a retiree's interest may be part of an employer-sponsored retirement program under ERISA, 28 U.S.C. §1002(34), (35); or a trustee may hold shares for beneficiaries under a trust document and the common law, *Restatement (Third) of Trusts* §§70-89 (2007). These variations, and more, are represented among the thousands of defendants in *Tribune* and *Lyondell*.

Unwinding any securities transfer through long chains of securities entitlements could require undoing or cancelling various transaction segments, affecting

---

[3] "[T]he securities intermediary's customer typically is the *beneficial* owner," with the last such owner in the chain "sometimes referred to as the *ultimate beneficial* owner." SEC, *Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, 69 Fed. Reg. 70,852, 70,853 & n.21 (Dec. 7, 2004) (emphasis added). If the sort of "beneficial" interest held by intermediaries in the indirect holding system satisfies the Seventh Circuit's conception of a "beneficial interest," then even if the judgment is affirmed, the Tribune and Lyondell transfers—and most contemporary securities transactions—will be safe harbored under §546(e). For purposes of this brief, however, Amici assume the court equated beneficial interests with the *ultimate* interest in the property.

numerous parties. At any point in a chain, an institution might have gone out of business or might be exposed to risk if a customer on whose behalf it acted was unable to satisfy a claim. And even if a bankruptcy trustee could avoid a transfer only as to the ultimate owner, without disrupting any other part of the transaction, that alone would create uncertainty and risk in the capital markets and thus raise the cost of capital. *See Tribune*, 818 F.3d at 121 ("A lack of protection against the unwinding of securities transactions would create substantial deterrents ... to investing in the securities market.").

The Seventh Circuit's belief that its reading of §546(e) would not cause a "ripple effect through the financial markets," Pet. App. 15, can be understood only in light of its narrow focus on the facts before it—a relatively small transaction involving a privately held company with only a few shareholders. That transaction did not touch the indirect holding system for public securities, and the Seventh Circuit declined to examine the broader impact of its decision. *Id.* 15-16 ("Nor are we persuaded that the repercussions of undoing *a deal like this one* outweigh the necessity of the Bankruptcy Code's protections for creditors." (emphasis added)). But Congress's use of words like "securities clearing agency" in §546(e) shows that public securities transactions consummated through the indirect holding system, like those in *Tribune* and *Lyondell*, were at the heart of Congress's concern in enacting the safe harbor. *See* H.R. Rep. No. 97-420, at 1 (1982) (noting that "commodities and securities markets operate through a complex system of accounts and guarantees," and explaining that safe harbor was needed for transactions in these markets "[b]ecause of the structure of the clearing systems in these industries"). The Seventh Cir-

cuit's narrow interpretation threatens large public transactions like these, which Congress unquestionably sought to protect.

II. The Bankruptcy Code's Text And Structure Make Clear That Section 546(e)'s Safe Harbor Applies Where A Qualifying Entity Acts Only As An Intermediary

As the Tribune and Lyondell transactions show, there is a compelling need to protect from avoidance securities-settlement payments where the payment is made by or to a Qualifying Entity, even if that entity acted only as an intermediary. That is exactly what Congress did in §546(e).

A. The Text Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is Only An Intermediary

1. By its terms, §546(e) requires only that the "transfer [be] made by or to (or for the benefit of)" a Qualifying Entity. A transfer of cash or other property can obviously be made "by" or "to" someone without that person having or obtaining a beneficial interest in the transferred property. Last Term, the Court observed: "As a matter of ordinary English, the word 'obtained' can (and often does) refer to taking possession of a piece of property without also taking ownership." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). So, too, with "by" and "to." For example, when a prospective homebuyer informs the seller that it has transferred the purchase-money funds "to" an escrow agent to hold pending closing, no one would understand the buyer to mean the escrow agent has obtained a beneficial (or ultimate) interest in the funds, just as no one would think the subsequent dis-

bursement "by" the escrow agent to the seller means the agent was, until then, the beneficial owner of those proceeds. On its face, therefore, §546(e) includes a transfer "by" or "to" a securities clearing agency, stockbroker or other Qualifying Entity, even when it acted "only" as an intermediary in the securities settlement process.

The court below nonetheless found the phrase "made by or to" ambiguous because, in its view, "a transfer through a financial institution as intermediary could reasonably be interpreted as being 'made by or to' the financial institution or 'made by or to' the entity ultimately receiving the money." Pet. App. 5. Both interpretations may be reasonable. The court of appeals went awry in assuming that one had to be right *to the exclusion of the other*. Nothing in the statutory text supports that assumption. One says naturally that, as happened in the Tribune and Lyondell transactions, a payment by a company of billions of dollars for its stock to a financial intermediary, with the expectation that the intermediary will distribute the appropriate amounts to each shareholder when that shareholder returns its shares or completes the necessary paperwork, is a transfer *both* "to" the intermediary *and* "to" the ultimate shareholder. The court of appeals' approach improperly injects a requirement—exclusivity—that is absent from the statute.

2. The phrase "or for the benefit of" reinforces this conclusion. The court below thought it "could refer to a transaction made *on behalf of* another [qualifying] entity," in which case "the whole phrase refers only to named entities receiving a financial interest—whether or not that entity received the actual transfer of property." Pet. App. 6. But, by focusing exclusively on this one phrase among a list of three alternatives, the court

inserted a requirement—that the Qualifying Entity have a beneficial interest—that contradicts the text. That the phrase "for the benefit of" is introduced by "or" shows it is an *alternative* way for a transaction to qualify and that the preceding phrase "by or to" *does not* include such a requirement. By listing three possibilities separated by "or," Congress made clear that the safe harbor protects transfers made "by" or "to" a Qualifying Entity, even when the transfer is not also "for [that entity's] benefit."

The simple reading that respects, and does not alter, the text is precisely the one so many other lower courts have adopted: the safe harbor applies if the transfer is *by* a Qualifying Entity (regardless whether it has a beneficial interest), *to* a Qualifying Entity (regardless whether it has a beneficial interest), *or* by or to a *non*-Qualifying Entity but "for the benefit of" a Qualifying Entity. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99-100 (2d Cir. 2013); *In re QSI Holdings, Inc.*, 571 F.3d 545, 551 (6th Cir. 2009); *Contemporary Indus. Corp.* v. *Frost*, 564 F.3d 981, 986-987 (8th Cir. 2009); *In re Resorts Int'l, Inc.*, 181 F.3d at 516; *Kaiser Steel Corp.* v. *Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990).

That reading is confirmed by the background against which Congress added the phrase "or for the benefit of" to §546(e). *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, §5(b)(1), 120 Stat. 2692, 2697. Before the amendment, most Circuits to address the question had recognized that the phrase "made by or to" included transfers where the Qualifying Entity acted as an intermediary, consistent with the interpretation urged by the SEC. *In re Resorts Int'l*, 181 F.3d at 515-516; *Kaiser Steel Corp.*, 913 F.2d at 848, 850; *In re Kaiser Steel Corp.*, 952 F.2d at 1236;

SEC Br. 11, *In re Kaiser Steel Corp.*, 952 F.2d 1230 (10th Cir. 1991) (Nos. 90-1243, -1245) ("SEC *Kaiser* Br."). Only a divided panel of the Eleventh Circuit had held otherwise, reading §546(e) to require that the transfer be "made" *both* "by or to" *and* for the benefit of a Qualifying Entity. *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (per curiam). The SEC disagreed with the Eleventh Circuit. *See* SEC Br. in Opp'n 5-6, *DFA Investment Dimensions Group, Inc.* v. *Munford, Inc.*, Nos. 97-550, -591 (U.S. Nov. 1997) ("SEC *Munford* Br."). In light of that history, Congress's insertion of the phrase "*or* for the benefit of" was a repudiation of *Munford*, clarifying that a Qualifying Entity's beneficial interest is a separate, sufficient basis for safe harbor, rather than a necessary (but insufficient) requirement.

3. This case illustrates how the Seventh Circuit's interpretation errs. The debtor's lender, Credit Suisse, transferred $55 million to Citizens Bank, which held the funds as escrow agent, for their ultimate payment to the debtor's shareholders. Upon the closing, Citizens Bank transferred part of the purchase price to one of those shareholders, Merit, in exchange for its stock. Three years later, Citizens Bank transferred to Merit the balance of the purchase price, which Citizens Bank had escrowed to reserve against indemnity claims by the debtor. Pet. App. 20-21; ECF 60-1, 60-11, 60-12, *FTI Consulting* v. *Merit Mgmt.*, No. 11-07670 (N.D. Ill. Nov. 5, 2014). Under the plain terms of §546(e), there was a transfer of cash (in which the debtor had an interest, as the borrower) "by" Credit Suisse "to" Citizens Bank, both financial institutions, and then two subsequent transfers—one occurring three years later—"by" Citizens Bank to Merit.

The error in the Seventh Circuit's approach is even starker in the context of a large transaction in publicly traded securities, like those in which amici were involved. In the Lyondell transaction, Citibank played a central role in facilitating the exchange of money and stock: Lyondell "deposit[ed]" $12.5 billion with Citibank; Citibank "receive[d] ... Shares ... surrendered for payment of [that] cash"; and Citibank "pa[id the] cash for [those] shares." Paying Agent Agreement ¶¶ 1(e), 3 (Decl. Firsenbaum, Ex. B, *In re Lyondell Chemical Co.*, Adv. Pro. 10-04609 (ECF 73) (Bankr. S.D.N.Y. Jan. 11, 2011)). That exchange yielded payments to the shareholders, which (as alleged in the *Lyondell* complaints) included dozens of banks and brokers that were registered holders of Lyondell shares and that, in turn, transferred payments to their respective customers that were the ultimate owners. *See* Complaint ¶¶ 15-194 (*In re Lyondell Chemical Co.*, Adv. Pro. 10-04609 (ECF 1-3, Ex. A) (Bankr. S.D.N.Y. Dec. 1, 2010). Likewise, the Tribune buyout involved payments to thousands of Tribune shareholders that were processed through CTC and cleared and settled through DTC. *See supra* Part I.A. Yet, even though these transactions involved transfers of billions of dollars "to" and "by" financial institutions, stockbrokers, and securities clearing agencies, the Seventh Circuit's reading would seemingly deny safe-harbor protection because the funds were not transferred for those Qualifying Entities' ultimate benefit.

4. That reading raises an additional textual difficulty. A single "transfer" could be *partially* voidable, something the statute does not allow. Under the Seventh Circuit's ruling, a trustee could avoid the transfer to the extent, but only to the extent, the ultimate owners were not Qualifying Entities. But §546(e) provides

that the trustee "may not avoid *a transfer*" to a Qualifying Entity. It does not contemplate that "a transfer" may be safe-harbored in part and avoided in part. Respondent's only possible response is to contend that in cases like *Tribune* and *Lyondell* there were thousands of transfers by the debtors, one to each ultimate owner, and each of those can be avoided if, but only if, the ultimate shareholder was not a Qualifying Entity under §546(e). But that ignores what actually happened: Tribune and Lyondell (really, their lenders on their behalves) each made just one or two wire transfers to CTC and Citibank, respectively, of the full proceeds to re-acquire all their shareholders' stock.

B. The Structure Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is An Intermediary

1. The Qualifying Entities function principally—or *exclusively*—as financial intermediaries in securities (or commodities) transactions, not as beneficial owners. It therefore would have made no sense for Congress to limit §546(e) to transactions where the Qualifying Entity has a beneficial interest. Rather, by including entities in §546(e) that always or at least often function as intermediaries, Congress must have intended to protect from avoidance transfers made through such entities to the myriad types of shareholders that are not themselves Qualifying Entities.

The Qualifying Entities "are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers." *Quebecor*, 719 F.3d at 100. A "securities clearing agency," for example, "acts as an intermediary in making payments or deliveries or both in connection with transactions in securities," or "acts as a custodian of securities in connection with a system

for the central handling of securities." 15 U.S.C. §78c(23)(A); *see* 11 U.S.C. §101(48) (incorporating §17A of the Securities Exchange Act of 1934); *see also* 15 U.S.C. §78q-1(b)(3)(A), (F) (responsibilities of registered clearing agents).

"Commodity broker" and "financial participant" likewise include a "clearing organization." 11 U.S.C. §101(6), 101(22A)(B); *see id.* §761(2). And "stockbroker" includes a person who "effect[s] transactions in securities ... *for the account of others*." *Id.* §101(53A) (emphasis added); *see also id.* §741(2) (defining "customer"). Similarly, "financial institution" includes banks and trust companies "acting as agent or custodian for a customer ... in connection with a securities contract." *Id.* §101(22)(A).

As these terms make clear, many of the entities named in §546(e) act primarily, if not exclusively, as intermediaries in settling securities transactions, rather than as beneficial owners trading for their own account. Congress's decision to tie §546(e) to such institutions can only be understood, therefore, as intended to safe harbor settled securities transactions that were facilitated by Qualifying Entities acting *as intermediaries*.

2. The Code defines "transfer"—the action expressly exempted from avoidance by §546(e)—to include a far broader range of actions than the conveyance of the ultimate, or beneficial, interest. "Transfer" includes "the creation of a lien," "the retention of title as a security interest," and "each mode ..., absolute or conditional, ..., of disposing of or parting with (i) property[] or (ii) *an interest* in property." 11 U.S.C. §101(54)(A)-(B) & (D) (emphasis added). Congress intended the term "transfer" to be "as broad as possible," and recognized that "possession, custody, and control

are interests in property." S. Rep. No. 95-989, at 27 (1978); H.R. Rep. No. 95-595, at 314 (1977). For example, when a debtor grants a lien in its property to a secured creditor, the creditor obtains only a security interest in the property, not beneficial ownership. And a securities clearing agency or stockbroker may obtain a legal interest in—or even take record title to—a security (or cash paid for that security) to facilitate a transaction, *without* acquiring any beneficial interest. *See, e.g., Kaiser Steel*, 952 F.2d at 1237-1238 (describing "street-side settlement" and "customer-side settlement"); *supra* Part I.B (discussing holding system as chain of "securities entitlements").

3. Section 546(e) does not require that the Qualifying Entity be a "transferee" of the transferred property, a term used in §550 that has been construed to exclude intermediaries. The omission of the term "transferee" from §546(e) confirms that Congress did not intend to limit the safe harbor to Qualifying Entities that are "transferees" under §550 with a beneficial interest, but rather intended §546(e) to safe harbor any settlement payment "by" or "to" a Qualifying Entity regardless whether that entity had the ultimate interest.

The difference in the statutory language in the two sections is telling. Section 550 identifies the parties that are liable when the trustee avoids a transfer under one of the Code's avoidance provisions (e.g., §§547 and 548, governing avoidance of preferential and fraudulent transfers). It provides that the trustee may recover the transferred property (or its value) from a "transferee." 11 U.S.C. §550(a). Many lower courts have held that a recipient of a transfer that acts as an intermediary is *not* a "transferee." *See, e.g., Bonded Fin. Servs.* v. *European Am. Bank*, 838 F.2d 890, 893-894 (7th Cir. 1988); *In re Finley, Kumble, Wagner, Heine, Under-*

berg, Manley, Myerson & Casey, 130 F.3d 52, 56-59 (2d Cir. 1997). Rather, these courts have held that an entity is a "transferee" only if, because of the transfer, it obtains "dominion over the money or other asset," with "the right to put the money to one's own purposes." *Bonded*, 838 F.2d at 893; *Finley, Kumble*, 130 F.3d at 56-57.

But, unlike §550, the term "transferee" appears nowhere in §546(e). The Seventh Circuit below (like the Eleventh Circuit before it) thus disregarded the actual words of the statute when it concluded that §546(e) was co-extensive with §550 and safe harbors a securities transfer only when the Qualifying Entity was the "transferee." *See* Pet. App. **12-13**; *Munford*, 98 F.3d at 610. To the contrary, Congress's choice not to limit §546(e)'s scope to "transferees," as it did in §550, shows that it intended no such limitation. *See Henson*, 137 S. Ct. at 1723 (this Court "presume[s] that differences in language like this convey differences in meaning"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Congress had good reason to extend the safe harbor to situations where Qualifying Entities act as intermediaries, even if Congress's only purpose in enacting §546(e) were to protect Qualifying Entities from liability, as the Seventh Circuit incorrectly supposed (*see* Pet. App. 2), rather than also to protect the broader financial markets in which they participate (*see infra* Part III.A-C). Although many courts have held that an intermediary is not a "transferee" liable under §550, the statute does not define the term "transferee" and hence

this interpretation is a judicially created body of law with uncertain application.[4]

The very case that spurred the enactment of §546(e) illustrates the point. In *Seligson* v. *New York Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975), a bankruptcy trustee brought a fraudulent-transfer suit against a clearing agency to recover margin payments that a commodities broker had made to the clearing agency before the broker filed for bankruptcy. *Id.* at 127. The clearing agency argued that it was a "mere 'conduit'" (because it had distributed the margin payments as profits to the parties on the opposite side of the trade from the broker), but the court denied it summary judgment, finding that the relationship between the clearing agency and its members raised a genuine issue as to whether the agency was a "transferee." *Id.* at 126-127, 134-136.

---

[4] *See, e.g., In re AgriProcessors, Inc.*, 859 F.3d 599, 604-606 (8th Cir. 2017) (bank was *intermediary* as to customer's deposits covering intra-day overdrafts but *transferee* as to deposits covering permanent overdrafts); *compare, e.g., In re Kaiser Steel Corp.*, 110 B.R. 514, 520-521 (D. Colo. 1990) (stockbroker was *intermediary*; lien rights against customer's settlement payments were insufficient dominion to be transferee), *aff'd*, 913 F.2d 846 (10th Cir. 1990), *with In re Manhattan Investment Fund Ltd.*, 397 B.R. 1, 17-21 (S.D.N.Y. 2007) (stockbroker was *transferee*; lien rights against customer's margin payments was sufficient dominion); *compare also, e.g., Bonded*, 838 F.2d at 893-894 (dominion requires unfettered right to "invest in lottery tickets or uranium stocks"), *with In re Incomnet, Inc.*, 463 F.3d 1064, 1075 (9th Cir. 2006) (dominion established by limited discretion though transferee "cannot invest funds in ... 'lottery tickets or uranium stocks'"); *cf. In re Harbour*, 845 F.2d 1254, 1257-1258 (4th Cir. 1988) ("conduit" was "transferee" under §550); *In re Southern Indep. Banking Corp.*, 126 B.R. 294, 299-300 (E.D. Tenn. 1991) (escrow agent was "transferee" under §550 "though it was merely a conduit").

Congress sought to "overrule[] *Seligson*." S. Rep. No. 95-989, at 106; *see* Pub. L. No. 95-598, §764(c), 92 Stat. 2549 (1978) (safe harboring commodities markets); H.R. Rep. No. 95-595, at 269-271, 392; Pub. L. No. 97-222, sec. 4, §546(d), 96 Stat. 235, 236 (1982) (extending safe harbor to securities markets). It did so by providing in §546(e) a broad safe harbor that applies whenever a securities payment is made "by" or "to" a Qualifying Entity, whether that entity was a "transferee" or merely an intermediary.

The 2006 amendment of §546(e) further confirms the point. By then, many courts had held that "transferee" excluded intermediaries. *See* 5 *Collier on Bankruptcy* ¶ 550.02[4][a] (16th ed.). And the Eleventh Circuit—splitting with the other circuits to reach the question—had construed §546(e) to apply only when the Qualifying Entity was a "transferee" under §550. Congress could have sided with the Eleventh Circuit by narrowing §546(e) to apply only when the Qualifying Entity was the transferee. Instead, Congress did the opposite—it *broadened* §546(e) to clarify that the safe harbor applies if the transfer was by, to, "*or*" for the benefit of a Qualifying Entity.

Congress did so because, as is evident from §546(e)'s text and structure, Congress sought to enact broader market protections than the Seventh Circuit credited. If Congress's only purpose had been to protect Qualifying Entities from potential *liability*, it would have done something much simpler and narrower than enact §546(e). It would have amended the *liability* provision of the Code, §550, to bar a trustee from recovering an avoided transfer from a Qualifying Entity. Had it done that, it would have achieved the precise result that the Seventh Circuit's decision below suggests: in situations like those presented in *Tribune* and

Lyondell, the trustee could seek to avoid and recover settlement payments from ultimate shareholders that were not themselves Qualifying Entities, but not from those that were.

Instead, Congress enacted a broad safe harbor that prohibits any securities-settlement payment made "by" or "to" or "for the benefit of" a Qualifying Entity from being *avoided* at all. Section 546(e) thus ensures that the settlement payment cannot be recovered from anyone, including any ultimate shareholder, regardless whether that shareholder was itself a Qualifying Entity.

4. Notably, the Seventh Circuit's analysis focuses almost exclusively on the characteristics of the ultimate *recipient* and effectively ignores that §546(e) also bars avoidance of any transfer made "*by*" a Qualifying Entity, even if the transfer is not made "to" such an entity. That Congress made the safe harbor applicable where the transfer was merely "by," and not "to," a Qualified Entity demonstrates that it intended the safe harbor to protect the securities markets and securities transactions, and not merely to free Qualifying Entities from potential liability. That is so because §550 imposes liability only on the "transfer*ee*" of an avoidable transfer, not on the transfer*or*. 11 U.S.C. §550. Barring avoidance of transfers made *by* Qualifying Entities thus has nothing to do with protecting such entities from liability. But it has everything to do with protecting the securities markets from the destabilizing effects of avoiding securities transactions.

5. The Seventh Circuit's attempts to interpret §546(e) by reference to other Code provisions also do not withstand scrutiny. The court pointed to §555, which permits Qualifying Entities to exercise termina-

tion rights under any securities contracts. Pet. App. 11-12. But nothing in §546(e) purports to limit its safe harbor to transfers where the Qualifying Entity is a party to a securities contract, much less to circumstances where such an entity has the ultimate interest in the transfer. Stockbrokers and other Qualifying Entities often contract to buy or sell securities on behalf of their customers, without having a beneficial interest in the transaction. *See, e.g., Kaiser Steel*, 952 F.2d at 1237-1238.

The court below also pointed to §548(c) and §548(d)(2), which provide a defense to avoidance to the extent the Qualifying Entity received a margin or settlement payment and acted in good faith. Pet. App. 10-11. The Seventh Circuit reasoned that reading §546(e) to apply where the Qualifying Entity is an intermediary would "be so broad as to render any transfer non-avoidable," and "that conflicts with section 548(c)'s good faith exception." *Id.* There is neither conflict nor surplusage. Section 546(e) does not protect any fraudulent transfer that is avoidable as an intentional fraudulent transfer under §548(a)(1)(A). But, in such a case, the defendant can assert good faith under §548(c). *See* 11 U.S.C. §548(c), (d)(2). Moreover, §546(e) applies only to certain securities- and commodities-related transfers, whereas §548(c)'s good-faith exception applies to all transfers.

The court below further noted that §548(a)(2) provides a safe harbor against avoidance of charitable contributions "to" qualified religious or charitable organizations. Pet. App. 11. It reasoned that the "'to' language in section 548(a)(2) should be read consistently with section 546(e), because ... otherwise ... charitable contributions made ... through a bank would be avoidable." *Id.* But reading §546(e) to apply where the Quali-

fying Entity is an intermediary does not lead to that result; reading §§546(e) and 548(a)(2) consistently would protect both settlement payments and charitable contributions made through such intermediaries.

Finally, the Seventh Circuit noted that §547 permits the trustee to avoid preferential transfers to creditors. Pet. App. 8. But nothing in §547 requires that a Qualifying Entity specified in §546(e) also be a creditor. As this case, *Tribune*, and *Lyondell* illustrate, fraudulent-transfer claims are frequently brought where the debtor makes transfers in securities transactions to intermediaries that are not creditors.

III. The Seventh Circuit's Narrow Reading Of §546(e) Threatens The Stability Of Securities Markets And Discourages Investment

Because the text and structure of §546(e) are clear, the Court need go no further. But, to the extent relevant, the objectives of §546(e) confirm the plain reading of the statutory text.

A. Congress's Purpose In Enacting §546(e) Was Not Only To Protect Qualifying Entities From Liability, But Also To Protect Settlement Finality And Market Stability

As discussed (*supra* Part II.B.3), Congress reacted to the *Seligson* decision not by crafting §550 to limit recovery against Qualifying Entities, but by enacting §546(e) to preclude altogether the avoidance of complex securities transactions involving clearing agencies, stockbrokers and other financial intermediaries. Congress established this safe harbor to "minimize the displacement" that a major bankruptcy might cause "in the commodities and securities markets." H.R. Rep.

No. 97-420, at 1; *Kaiser Steel*, 913 F.2d at 848 (noting "legislative intent behind § 546 to protect the nation's financial markets from the instability caused by the reversal of settled securities transactions"). Congress sought to "[e]nsure the stability of the market," H.R. Rep. No. 97-420, at 2, and to "promot[e] finality[,] ... 'speed and certainty in resolving complex financial transactions'." *Kaiser Steel*, 952 F.2d at 1240 n.10 (quoting H.R. Rep. No. 101-484, at 2 (1990)).

Preventing avoidance of transfers in which Qualifying Entities function as intermediaries furthers §546(e)'s purposes because it is precisely when those entities so function that clearing agencies, brokers, financial institutions, and other Qualifying Entities provide the essential market stability and finality that Congress sought to protect. *See Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong., Supp. App. pt. 4, at 2377-2384 (1976) (CFTC Chairman testifying that clearing agencies enhance market stability as intermediaries); 15 U.S.C. §78q-1(b)(3)(A), (F) (clearing agency responsible for "facilitat[ing] the prompt and accurate clearance and settlement of securities transactions," and "protect[ing] investors and the public interest").

As the Second Circuit has observed, "[u]nwinding settled securities transactions" made through such intermediaries "would seriously undermine ... markets in which certainty, speed, finality, and stability are necessary to attract capital." *Tribune*, 818 F.3d at 119. "The method of settlement through intermediaries is essential to securities markets. Payments by and to such intermediaries *provide certainty as to each transaction's consummation*, speed to allow parties to adjust the transaction to market conditions, finality with regard to

investors' stakes in firms, and thus stability to financial markets." *Id.* (citing H.R. Rep. No. 97-420; H.R. Rep. No. 95-595) (emphasis added). A "clear safe harbor for transactions made through these financial intermediaries promotes stability in their respective markets." *Quebecor*, 719 F.3d at 100 ("transaction[s] involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets").

The SEC has consistently stressed these points over the past two decades. Expressly disagreeing with the first appellate decision that restricted §546(e) to the relatively rare circumstance when a Qualifying Entity is the ultimate owner, the SEC explained that Congress enacted §546(e) "to protect entities that act as 'conduits' between buyers and sellers in clearing and settling millions of securities transactions every year, as well as the buyers and sellers themselves, from the uncertainty and disruption in the securities markets that could otherwise be caused by the risk or actuality of bankruptcies affecting market participants." SEC *Munford* Br. 5-6. The SEC continued: "Holding Section 546(e) inapplicable to payments made by or to brokers, clearing agencies, or financial institutions whenever they could be characterized as acting as 'conduits,' rather than as principals, would largely nullify the statute." *Id.* The SEC has repeated that view in subsequent cases. Most recently, in *Tribune* the SEC noted that allowing settlement payments to "individual shareholders" to be avoided and recovered would undermine market stability by "creat[ing] an environment hostile to capital formation." SEC Br. 1-2, 13-14, *In re*

Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d Cir. Mar. 6, 2014), ECF No. 161.[5]

In short, the broad reading of §546(e) that most Circuits have adopted follows not only from its text, but also from Congress's unqualified statement that the safe harbor "expressly extend[s] ... protections to the securities market." H.R. Rep. No. 97-420, at 375.

B. The Seventh Circuit's Narrow Construction Of §546(e) Would Destabilize Securities Markets By Unwinding Long-Settled, Complicated Transactions And Creating Arbitrary Distinctions Among Market Participants

As Congress and the SEC have recognized, permitting plaintiffs to unwind multi-billion-dollar transactions, involving transfers between thousands of different market participants a decade earlier, would inject substantial uncertainty and increased exposure into a system that demands certainty and finality.

1. Recovery from the ultimate owner at the end of a potentially long chain of intermediaries could require litigation regarding a string of transfers that occurred years earlier. As a plaintiff sued each owner in the chain, each defendant would try to avoid liability by pointing to another, including possibly a Qualifying Entity, as the supposed true beneficial owner. Litigation would ensue as to whether one or another party had sufficient "dominion" over the proceeds to be a "transferee" from whom the avoided transfer could be recovered under §550.

---

[5] *See also, e.g.*, SEC Br. 1-2, 17-21, *Enron Creditors Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, No. 09-5122 (2d Cir. Aug. 23, 2010); SEC *Munford* Br. 3 (noting previous filings at panel and *en banc* stages before Eleventh Circuit); SEC *Kaiser* Br. 10-19.

The Seventh Circuit's standard is not the one underlying modern statutes governing the securities holding system. Rather, as discussed above (*supra* Part I.B), parties generally have "securities entitlements" against the next party in the chain, which gives the exclusive right to direct the next party to sell its interest and to receive payment in exchange. And modes of ownership can vary considerably. Thus, the question who has a sufficient "beneficial interest" to satisfy the Seventh Circuit's test can be quite fraught. In *Tribune*, for example, one defendant is Tribune's 401(k) plan, which had invested in Tribune stock on behalf of Tribune employees. That 401(k) plan is a legal entity, but whether it or each of its thousands of employee participants is the "beneficial owner" of shares could be critically important, especially if participants have withdrawn their funds. The 401(k) plan and its beneficiaries would be turned against one another. Similar questions would arise in other relationships, especially if one party were a Qualifying Entity, such as if the trustee of a common testamentary trust that owned the shares were a financial institution or a customer thereof.

In a large public-company transaction, the process would be particularly disruptive. Many investors would no longer be clients of the intermediary they used for the unwound transaction. At a minimum, the avoidance claims would generate protracted and costly litigation as parties in the chain attempted to pass the buck to (or prevent the buck from passing from) another actor in the chain. The massive exposure would result in bet-the-company litigation for many participants, leading creative lawyers to litigate over the true nature of ownership and to seek to insulate their clients from liability. That litigation alone would threaten to destabilize the market. The risk that different courts

would reach different conclusions as to which participants and forms of ownership are protected would only exacerbate the problem.

If successful, these claims could have ripple effects on other market participants. "If a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk." *Enron Creditors Recovery Corp.*, 651 F.3d at 334.

2. Limiting §546(e)'s safe harbor would further destabilize the market by creating arbitrary distinctions. Under the Seventh Circuit's interpretation, certain institutional investors acting for their own account would be immune from avoidance actions, whereas other investors would not. Likewise, mutual funds registered under the Investment Company Act of 1940 would be protected, but investment companies exempt from that Act's registration requirements would not. *See* 11 U.S.C. §101(22)(B).

Whether individual investors would face exposure would similarly depend on the happenstance of how they held the investment. For example, individual shareholders would be protected if they held the shares as a customer of a commercial or savings bank, because the definition of "financial institution" includes not only banks themselves, but also their customer "when any such ... entity is acting as an agent or custodian for a customer." 11 U.S.C. §101(22)(A).

These arbitrary distinctions would create opportunities for arbitrage, allowing sophisticated investors to exploit price differences and shift cost and potential liability to the rest of the market. In the run-up to a

transaction with potential risk of future constructive fraudulent-transfer claims, unprotected investors would have to discount the value of the shares for the risk of those potential claims, while protected investors could buy the target shares without that risk, thus gaining a windfall. Those exposed would be the least sophisticated investors—often retirees or others who can least afford it (many of whom are defendants in *Tribune* and *Lyondell*). Such distinctions, disfavoring those least able to protect themselves, would undermine Congress's aim of enhancing market stability.

C. Eliminating The Section 546(e) Safe Harbor For Transfers Through Intermediaries Would Erode Investor Confidence, Discourage Public Investment, And Reduce Liquidity

Both Congress and the courts have recognized the importance of "promot[ing] investor confidence" in the integrity and efficiency of securities markets. *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (noting that is the "basic purpose" of the federal securities laws). "The success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of our markets." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 174 n.10 (2008) (quoting S. Rep. No. 104-98, at 8 (1995)).

Echoing this sentiment, Congress drafted §546(e) to foster investor confidence in the securities markets and promote capital formation. As the Second Circuit has observed, §546(e)'s broad language protects "transactions rather than firms ... in order to reduce the cost of capital to the American economy," and was "sought by the SEC ... to protect investors" from the unwinding of securities transactions. *Tribune*, 818 F.3d at 121-

122; *see also Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 748 (7th Cir. 2013) ("Congress enacted [§]546(e) to ensure that honest investors will not be liable" if a transaction renders a company insolvent).

The possibility that settled transactions could be unwound, and the funds clawed back, would lead to an increase in both the cost and volatility of transactions in the capital markets. If, for example, ERISA plans were liable to return proceeds of a transaction associated with participants who had already cashed out or otherwise exited the plans, they would need to retain reserves to cover potential liability and protect current participants, and that, in turn, would "suck money from capital markets." *See Tribune*, 818 F.3d at 119; *see also id.* at 121-122 (observing that a narrow view of the safe harbor would lead to a net "reduction of capital available to American securities markets" by exposing "all investors in public companies [to] new and substantial risks").

Concerns about fraudulent-conveyance liability could also reduce the liquidity of investments. Shares in Tribune and Lyondell were actively traded up to the closing of the transactions.[6] Shareholders needing immediate cash, or seeking to avoid a possible hitch in the closings, were able to eliminate their positions before the transactions closed in the companies through market sales. If potential buyers had believed they risked losing the entirety of their investment in the event the company later filed bankruptcy, they would naturally have been less willing to purchase the stock or would have offered a lower price.

---

[6] *Historical Price Table for Tribune Co. 10/08/07 to 12/07/07*, Bloomberg LP; *Historical Price Table for Lyondell Chemical Co. 10/22/07 to 12/21/07*, Bloomberg LP.

Further, the threat of constructive fraudulent-conveyance claims would undermine investors' "reliance on the integrity of the market"—a factor this Court has deemed essential to our efficient market—and thereby inhibit capital formation. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). In many instances, a constructive fraudulent-conveyance action to avoid securities-settlement payments, in effect, would allege merely that the market mis-valued the company whose shares were involved. To permit a settled securities transaction to be unwound on nothing more than that would strike at the very heart of individual investors' ability to rely on the market. By contrast, in the rare instance that a securities transaction resulted from actual fraudulent intent, the market process has already been tainted, and the beneficiary of that fraudulent intent (even if unwitting) has a less powerful claim against upsetting settled expectations.

In light of these concerns, but also cognizant of the desire to protect creditors with unsatisfied claims, Congress made a policy judgment in §546(e): protect the finality of settled securities transactions and the stability of the securities markets from the disruption that would be caused by constructive fraudulent-transfer claims, which are easily alleged when the issuer becomes insolvent and files for bankruptcy, while preserving claims for creditors who are victims of intentional fraud. *See* 11 U.S.C. §546(e) (excluding from safe-harbor intentional fraudulent-transfer claims under §548(a)(1)(A)).

Tribune and *Lyondell* illustrate how this balance operates in practice. Even under the Second Circuit's broad interpretation of §546(e), requiring the dismissal of the constructive fraudulent-transfer claims in those cases, plaintiffs were able to pursue intentional fraudu-

lent-transfer claims, to the extent they could allege actual fraudulent intent. *See Tribune*, 818 F.3d at 112; *In re Lyondell Chem. Co.*, 554 B.R. 635, 646 (S.D.N.Y. 2016). Under the Seventh Circuit's ruling, a trustee would face the far lighter burden of pleading *constructive* fraudulent conveyance and could tie up investors for a decade or longer.[7]

Nothing in the text or structure of §546(e) compels the Court to construe it in a way that so seriously undermines Congress's purposes.

D. At A Minimum, The Court Should Reserve Decision On §546(e)'s Application To Transfers Involving Securities Settled Through The Public Company Clearing And Settlement System

If the Court affirms the Seventh Circuit's holding that §546(e) does not apply to the *Merit Management* transaction, it should reserve ruling on the question whether the safe harbor protects transactions that are cleared and settled through the national clearing system even where Qualifying Entities are not the ultimate (or beneficial) shareholders of the public company that was the subject of the transaction, as in *Tribune* and *Lyondell*.

The Tribune and Lyondell transactions lie at the heart of Congress's concern in enacting §546(e). In its original enactment, Congress focused on the involvement of securities clearing agencies and stockbrokers, which act largely or exclusively as financial intermedi-

---

[7] *See, e.g.*, 11 U.S.C. §544 (allowing trustee to invoke state fraudulent-transfer law "reach-back" periods); *In re Frank Santora Equip. Corp.*, 256 B.R. 354, 372 (Bankr. E.D.N.Y. 2000) (six-year reach-back period under New York law).

aries in the transfer of publicly held shares in large companies. *See* 128 Cong. Rec. 15,980, 15,981 (1982) (highlighting that §546(e) "encompasses both stockbrokers and securities clearing agencies"); H.R. Rep. No. 97-420, at 3 (statement of Sen. Dole) (same); *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 76 (Bankr. E.D.N.Y. 2007) (concluding that the safe harbor was designed to protect public company transactions). There can be little question that the statue as originally enacted protected transfers to those entities, and then by those entities to further participants in the securities markets, as occurred, for most shares, with the transfer to and then by DTC in the Tribune and Lyondell transactions. Two years after §546(e)'s enactment, Congress *broadened* the provision by adding to the list of Qualified Entities "financial institution[s]," which often play a similarly central role in settling massive public securities transactions, as CTC did in *Tribune* and Citibank did in *Lyondell*. *See* Pub. L. No. 98-353, § 461, 98 Stat. 333, 377 (1984).

Under the interpretative canon *noscitur a sociis*, the new category of Qualified Entities—"financial institution[s]"—should be interpreted consistently with "the company it keeps." *McDonnell* v. *United States*, 136 S. Ct. 2355, 2368-2369 (2016) (quotation marks omitted). Therefore, even if the Court concludes that the role played by Citizens Bank in this case is not sufficiently comparable to the roles played by DTC, stockbrokers, and other intermediaries in *Tribune* and *Lyondell* to warrant application of the safe harbor, the Court should clarify that it is not precluding application of the safe harbor to those transactions that sit at the center of Congress's concerns, as the Tribune and Lyondell transactions do.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP
2099 Pennsylvania Ave., NW
Washington, DC 20006

D. ROSS MARTIN
JOSHUA Y. STURM
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036-8704

Counsel for Certain Tribune Defendants

PHILIP D. ANKER
Counsel of Record
ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8890
philip.anker@wilmerhale.com

JOEL MILLAR
DAVID M. LEHN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Counsel for Certain Tribune (Creditor Actions) and Lyondell Defendants

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

JULY 2017